No. 305



# In the Supreme Court of the United States

OCTOBER TERM, 1967

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

*v.*

NEW ENGLAND ELECTRIC SYSTEM, ET AL.

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## INDEX



## CITATIONS

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The Solicitor General, on behalf of the Securities and Exchange Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered in this case on March 31, 1967.

## OPINIONS BELOW

The opinion of the court of appeals on the judgment sought to be reviewed here (App. A, *infra*, pp. 16-38) is not yet reported. The findings and opinion of the Securities and Exchange Commission (R. 1254-1282; App. B, *infra*, pp. 40-73) are reported at 41 S.E.C. 888. An earlier opinion of the court of ap-

peals (App. C, *infra*, pp. 74-97) is reported at 346 F. 2d 399. This Court's opinion reversing the court of appeals' first decision is reported at 384 U.S. 176.

## JURISDICTION

The judgment of the court of appeals (App. A, *infra*, p. 39) was entered on March 31, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

Section 11(b)(1)(A) of the Public Utility Holding Company Act of 1935 permits a public utility holding company to control more than one integrated public utility system only if separation would entail "the loss of substantial economies." In *Securities and Exchange Commission* v. *New England Electric System*, 384 U.S. 176, this Court (reversing the court of appeals, which had set aside the Commission's order) held that the statute is not satisfied by showing that separation will result in a substantial business loss; the economies from retention must be so important that their loss would cause a serious impairment of the separated system. On remand the court of appeals again set aside the Commission's order. The basic question presented is whether, in so doing, the court misapprehended the standard laid down by this Court for interpreting the substantial-economies provision and improperly shifted the burden of proof on the issue of substantial economies from the holding company to the Commission. In addition, we present

these specific questions which are facets of the lower court's basic error:

1. Whether the Commission, in deciding whether a loss of substantial economies would occur, was entitled to consider offsetting advantages that the separated system would likely enjoy by reason of independent operation, without attempting to fix a specific dollar value therefor.

2. Whether the Commission, having found that respondent's study of the added costs of independent operation contained serious deficiencies, was entitled to reject the study in its entirety as providing an unreliable basis for determining whether divestiture of the gas properties would cause a loss of substantial economies.

3. Whether the Commission, having found on the basis of evidence concerning comparable utility systems that the separated system would have an adequate margin of revenue over costs for successful independent operation, was also required to make a specific determination as to the system's future rate of return and its effect upon the cost and availability of financing.

## STATUTE INVOLVED

Section 11(b) of the Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U.S.C. 79k(b), provides in pertinent part:

> It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, * * * *Provided, however*, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system * * *.

## STATEMENT

Respondent, New England Electric System ("NEES"), is a holding company registered under Section 5 of the Public Utility Holding Company Act of 1935, 49 Stat. 812, 15 U.S.C. 79e. It controls utility companies serving electric customers in New Hampshire, Massachusetts, Rhode Island and Connecticut and retail gas companies in Massachusetts. In 1957 the Securities and Exchange Commission, pursuant to Section 11(b)(1) of the Act, instituted proceedings to determine (among other questions) whether NEES was entitled to retain the gas companies. Section 11(b)(1) provides that a registered holding company, unless it qualifies for an exception

under the statute, may control only a single integrated public utility system. NEES' electric companies have been found to constitute such a system (*New England Electric System*, 38 S.E.C. 193), and NEES has elected to retain them in the event that it is forbidden to control the gas companies as well. NEES argued that it was entitled to retain the gas system under the exception provided by clause (A) of 11(b)(1), which permits retention of an additional system that "cannot be operated as an independent system without the loss of substantial economies * * *." After extended hearings, the Commission rejected this contention and ordered the divestiture of the gas companies. 41 S.E.C. 888; App. B, *infra*, pp. 40-73.

In its initial review, the court below set aside the Commission's order on the ground that the Commission had misinterpreted the statutory expression, "loss of substantial economies." In the court's view, it meant simply a substantial business loss. 346 F. 2d 399; App. C, *infra*, pp. 74-97. This Court reversed. 384 U.S. 176. It approved the Commission's interpretation, which requires a showing that the "additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system." 384 U.S. at 179. The Court remanded the case to the court of appeals for "review of the challenged order in light of the proper meaning of the statutory term." *Id.* at 179-180.

On remand, the court below again set aside the Commission's order. Proceeding on the premise that the Commission is to be held to a "most stringent" standard in evaluating a defense of loss of substantial economies (App. A, *infra*, p. 22), the court identified three areas where, in its view, the Commission's analysis had been deficient. The first related to a cost study (the "Ebasco" study) introduced by NEES in the Commission proceeding, which purported to show that the gas system would incur some $1 million annually in additional costs of billing, meter reading, accounting and other items if divorced from the electric system. On the basis of an analysis as to which the court of appeals said, "[w]e do not necessarily criticize the Commission for its skepticism in the specifics" (App. A, *infra*, p. 24), the Commission had found that the study was deficient in a number of particulars and not a reliable basis for measuring the costs of independent operation, especially in view of its inconsistency with the experience of comparable independent gas systems (see *infra*, pp. 6-7). The court of appeals held, however, that the Commission had erred in rejecting the study *in toto;* that it should have ascertained whatever reduced amount the study supported and determined whether that amount was substantial (App. A, *infra*, pp. 24-25).

Second, NEES had argued to the Commission that since gas companies in New England operate on a small margin of revenue over costs—this because of the high cost of gas in that region—its gas system could not afford such added costs as might be entailed

by independent operation. The Commission had rejected this contention, noting, among other things, that other gas systems in Massachusetts operate profitably, including those not under common control with electric systems; that the gas system resulting from separation would be the second largest in the region; and that its ratio of costs to revenue—even assuming that the estimate of losses contained in the Ebasco study was correct—would compare favorably with other Massachusetts gas systems. The court of appeals found the Commission's answer inadequate. It held that "the focus must be on the specific characteristics of the NEES companies"—in particular, on whether the rate of return that the gas system would enjoy after separation would be large enough to attract the new investment necessary for the survival and growth of the system (App. A, *infra*, pp. 27-28).

Finally, in finding that NEES' gas system could effectively stand alone, the Commission had relied in part on a presumption drawn from the history and purpose of the Public Utility Holding Company Act and from its own experience that a gas system is more likely to prosper if it is free from the control of a holding company that has interests in a competing power source. The court of appeals, however, held that the Commission could not give "independent significance to the generalized competitive advantages" that it had found but must "confine itself to a quantitative analysis of the substantiality of" the economies lost (*id.*, pp. 33-34).

The court ordered the case returned to the Commission "for further proceedings and an analysis by the Commission responsive to the difficulties which we have set forth" (*id.*, p. 34).

## REASONS FOR GRANTING THE WRIT

In its previous decision, the court of appeals held that "the loss of substantial economies" warranting the retention by a public utility holding company of an additional system means simply a substantial business loss. In its present decision, the court of appeals, bowing to this Court's intervening ruling, *Securities and Exchange Commission* v. *New England Electric System*, 384 U.S. 176, acknowledged that a loss large enough to cause a serious impairment of the separated system must be shown, but went on to hold that the Commission's action in rejecting a defense of loss of substantial economies must withstand a "most stringent" scrutiny and that, so tested, the Commission's order was fatally deficient. So ruling, the court fell into error which should be corrected because of its substantial adverse impact upon the administration of the Public Utility Holding Company Act.[1]

1. The basic error of the court of appeals, in our view, is its notion that the Commission, rather than

[1] In our petition for a writ of certiorari in the prior *NEES* case, No. 636, O.T., 1965, pp. 12-15, we noted the large number of potential proceedings that could be affected by a ruling on the meaning of "loss of substantial economies". Those observations apply equally to the present case, and we incorporate them by reference.

the holding company, bears a "most stringent" burden of proof on the question whether separation will involve a loss of substantial economies within the meaning of the Act. This inverts the scheme of the Act and is directly contrary to the principles of this Court's *NEES* decision last Term. The proviso in Section 11(b)(1) represents an exception to the basic policy of limiting a registered holding company to the operation of a single integrated public utility system. This Court so stated when it explained that "[t]he requirement in § 11 of a 'single integrated' system is the 'very heart' of the Act. The retention of an 'additional' integrated system is decidedly the exception." 384 U.S. at 180, quoting *North American Co. v. Securities and Exchange Commission*, 327 U.S. 686, 696-697, 704, n. 14. Since Congress' basic policy was to create independent utility systems, the Court deemed appropriate "a much more stringent" and exacting standard defining when a loss of economies is substantial than the court of appeals' business-loss test. 384 U.S. at 181-183.

It follows, we think, that the burden of establishing entitlement to retention of an additional system on the ground of loss of substantial economies is on the holding company and is a heavy one, and that deficiencies in the proof on the issue should be resolved against the company, not against the Commission's order of divorcement. Cf. *United States v. First City National Bank of Houston*, 386 U.S. 361. The court here, however, believing that the Commission's case on substantial economies, rather than

the holding company's, must withstand stringent scrutiny, resolved all doubts in favor of retention.

For example, while not rejecting the Commission's finding that the cost study introduced by NEES to show the amount of the loss that separated operation would entail contained serious deficiencies which undermined its reliability, the court held that the Commission was responsible for supplying an accurate estimate of the loss. If, as we believe, the basic policy of the Act is against the retention of additional systems and the burden of establishing an exception is upon the holding company, the Commission should not be required to remedy the deficiencies in the holding company's proof. Having failed to submit a study that provided a satisfactory basis upon which to predicate a finding that the economies to be lost upon divestiture would be substantial, NEES did not sustain its burden of showing that the additional system was retainable, and the Commission's order should have been sustained.

Similarly, we think the court erred in holding, in the circumstances of this case, that the Commission's order could not stand in the absence of a specific finding that the rate of return of the gas system under independent operation would be adequate to generate additional capital necessary for the system's survival and growth. What the court did was to calculate the rate of return that the gas system would enjoy on the hypothesis that the estimate of losses contained in the Ebasco study was correct, from which it concluded that the resulting rate—4.1 percent—was so low that additional inquiry by the Commission was

required (App. A, *infra*, pp. 29). The court, however, ignored the fact that the Commission, on the basis of an analysis largely unchallenged by the court, had found the study to be an unreliable guide. The flaws in the study found by the Commission and the inherently speculative character of an estimated rate of return based upon such projections made the level of return of little significance here in evaluating the substantiality of the claimed increases in expenses upon divestiture. This was particularly so in view of the substantial evidence before the Commission indicating that, notwithstanding the alleged losses that separation might entail, the gas system was perfectly capable of thriving under independent operation.

Thus, the Commission noted that the separated gas companies would constitute the second largest gas system in Massachusetts; that the other gas systems in the area were thriving, although some have no affiliation with an electric system; that the ratio of costs to revenue of the NEES gas system after separation would compare favorably with the other Massachusetts systems even accepting the inflated loss figure submitted by NEES;[2] that any losses immediately consequent on divestiture might well be compensated for by the benefits that could be expected to flow from freeing the gas system from domination by a holding company controlling a competing form of energy;

[2] NEES selected these companies as a basis for comparison to support its own projected estimates of the post-separation costs of NEES's gas system. Yet, in the court below, it disputed the propriety of the Commission's drawing its own inferences from the costs of these companies.

and, finally, that the projected losses were not out of line with those found to be insubstantial in previous divorcement proceedings under the Act. Such comparative evidence would appear far more objective and probative than a necessarily speculative attempt to predict from estimated loss of economies the gas system's ability to attract necessary new capital, or to forecast the losses that the system might incur if it failed to explore other ways besides common ownership with an electric system of achieving operating economies. In any event, NEES presented no evidence to show that the NEES gas system is so different from other Massachusetts gas systems that a detailed analysis of its specific characteristics is necessary.

It is apparent from the foregoing that the court of appeals' decision, if followed, would greatly complicate the trial of holding company cases. This case, already in its tenth year, would be extended substantially. The Commission's resources for administering the holding company program would be sorely strained. And if all doubts are to be resolved in favor of retention—the basic theme of the court of appeals' decision—the statutory plan generally to limit holding companies to a single system will be robbed of its practical efficacy and this Court's *NEES* decision set at naught. Consequences so serious plainly require review by this Court.

2. Besides unwarrantedly extending the scope of the inquiry that the Commission must make in a holding company case, the court below improperly curtailed the Commission's discretion with respect to

an important issue in such cases: whether, in weighing the impact of the added costs of independent operation, the Commission may recognize as an offsetting consideration the advantages to the independent operator that are likely to flow as a result of his freedom from domination by a holding company that has a financial stake in a competing energy source. As this Court noted in *Securities and Exchange Commission* v. *New England Electric System*, 384 U.S. 176, 183, "One of the evils that had resulted from control of utilities by holding companies was the retention in one system of both gas and electric properties and the favoring of one of these competing forms of energy over the other." The Court expressly noted in its *NEES* opinion that the Commission in this case had "found that any losses of economies would be offset by the benefits that would flow from the healthy competition between the independently controlled gas and electric companies" (384 U.S. at 179), and commented (*id.* at 184-185):

> Competitive advantages to be gained by a separation are difficult to forecast. The gains to competition might well be in the public interest and might well offset the estimated loss in economies of operation resulting from a separation of the gas properties from the utility system. This is a matter for Commission *expertise* on the total competitive situation, not merely on a prediction whether, for example, a gas company in a holding company system may make more for investors than a gas company converted into an independent regime.

The court below quoted this language, but in disregard of its clear import held that the advantage of competition is something the Commission is "entitled to take into account * * * as justifying a stringent test of 'substantiality.' But, that done, the general judgment has no independent significance in an individual case" (App. A, *infra*, p. 33). The language of this Court, quoted above, makes clear that offsetting benefits are relevant not merely to the formulation of the statutory standard for determining when the loss of economies is substantial—as the court of appeals suggested in its second opinion—but to the application of the standard in a particular case as well. Nor is it tenable that the Commission can take such benefits into account only in a case where they can be translated into a precise dollar figure. Such a requirement is impossible to comply with; to impose it is to deny any role to offsetting benefits. The requirement is also unsound. That the benefits of free and independent competition cannot be quantified does not make them insubstantial or unworthy of consideration. A qualitative judgment is indeed required, but that is precisely the kind of judgment which this Court on its earlier review of this case stated the Commission was empowered to make. In reading this factor out of holding company cases, the court below has refused to give effect to the policy of the Act and to the principles announced by this Court when the case was last here.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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PHILIP A. LOOMIS, JR.,
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*Securities and Exchange Commission.*

JUNE 1967.

## APPENDIX A

# UNITED STATES COURT OF APPEALS
For the First Circuit

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No. 6332

NEW ENGLAND ELECTRIC SYSTEM, ET AL., PETITIONERS

*v.*

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

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On Petition for Review of an Order of the Securities and Exchange Commission

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Before ALDRICH, *Chief Judge*, WOODBURY*, *Senior Judge*, and COFFIN, *Circuit Judge*

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*John R. Quarles*, with whom *Richard B. Dunn*, *Richard W. Southgate*, *John J. Glessner, III*, and *Ropes & Gray* were on brief, for petitioners.

*David Ferber*, Solicitor, with whom *Philip A. Loomis, Jr.*, General Counsel, *Martin D. Newman*, Attorney, *Solomon Freedman*, Director, Division of Corporate Regulation, and *Aaron Levy*, Assistant Director, Division of Corporate Regulation, were on brief, for respondent.

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March 31, 1967

COFFIN, *Circuit Judge*. This petition for review of a Securities and Exchange Commission order is before us for a second time, on remand from the Su-

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* By designation.

preme Court. The petitioner, New England Electric System (NEES), is a registered holding company controlling fourteen electric utility and eight gas utility companies in the New England states. In August 1957 the Commission instituted proceedings to determine whether NEES was entitled to retain that control under the standards of section 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79k(b)(1). Extensive hearings, resulting in a record of nearly 1,500 pages, culminated in the Commission's order of March 19, 1964, requiring NEES to divest itself of all its gas companies.

In our earlier opinion, as here, we focused primarily on the Commission's application to the NEES system of the "substantial economies" test of section 11 (b)(1)(A), 15 U.S.C. § 79k(b)(1)(A). Generally, section 11(b)(1) allows a holding company to control only one system of operating utility companies. However, control of an additional integrated public utility system [1] is permitted if, in addition to size and location requirements not here in dispute, the Commission finds that the system "cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control" by the holding company.

We held that the statutory words, "loss of substantial economies", called for "a business judgment of what would be a significant loss, not for a finding of

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[1] As applied to gas companies, an integrated public utility system is "a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a single area or region . . . ." 15 U.S.C. § 79b(a)(29)(B). The Commission held, and it is assumed here, that the eight gas companies constitute such a system.

total loss of economy or efficiency". *New England Elec. System* v. *SEC*, 1 Cir., 1965, 346 F.2d 399, 406. Since we read the Commission's opinion as holding incorrectly that lost economies would not be substantial unless divestment would render "economical or efficient operation" impossible, and since we believed that under the appropriate standard the Commission could have found for NEES on the record before it, we ordered the case remanded. The Supreme Court reversed, holding that the Commission's interpretation of the statute was correct, and remanded the case to us for review of the Commission's order in light of the proper meaning of the statutory term. *SEC* v. *New England Elec. System*, 1966, 384 U.S. 176.

In approving the Commission's interpretation of section 11(b)(1)(A), the Court said that it required a showing that the "additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system." 384 U.S. at 179. In illustration the Court quoted the language of the House report, that there must be a showing of "a real economic need"; of Senator Wheeler, speaking after the bill was passed, that the exception would apply only to systems "so small that they were incapable of independent operation"; and of the Commission itself, in *Philadelphia Co.*, 1948, 28 S.E.C. 35, 46, that there must be a "situation in which the proven inability of the system to stand by itself would result in substantial hardship to investors and consumers were its relationship with the holding company terminated." Finally, the Court concluded (1) that the proper test was "much more stringent" than a business judgment of significant loss; (2) that while economy in man-

agement was one theme of the act, eliminating restraint of free competition was another; and (3) that offsetting gains to competition, difficult to forecast, were "a matter for Commission *expertise* on the total competitive situation, not merely on a prediction whether, for example, a gas company in a holding company system may make more for investors than a gas company converted into an independent regime." 384 U.S. at 185.

The only area remaining for definitional dispute is whether the holding company, to justify retention, must prove that severance will result in imminent bankruptcy of the subsidiary, or something less—a condition allowing survival but not on a sound or "healthful continuing" basis, *Engineers Pub. Serv. Co.* v. *SEC*, D.C. Cir., 1943, 138 F.2d 936, 944. We think the answer lies in the latter definition. This, we think, stems from a careful reading of the Court's opinion, particularly in the light of the Commission's opinion which it was interpreting.

We have taken pains to summarize the sequence of quotations cited by the Court, all of which have been relied on by the Commission, because, while they are internally consistent in militating against a test of business judgment of probable significant loss, they suggest that the Commission has not always been clear as to whether it considers "serious impairment" or "inability to survive" the standard. The first two quotations are consistent with the former; the last two, with the latter.

That the Court's use of the "serious impairment" language reflected the fair import of the Commission's opinion is clear. That opinion contained only one reference—to Senator Wheeler's language above quoted—consistent with an "inability to survive" test. Its

remaining verbalizations were "real economic need" (House Report language above quoted); "ability of the additional system to operate soundly" (Commission's own formulation); "important economies" (*North American Co.* v. *SEC*, 2 Cir., 1943, 133 F.2d 148, 152) related to "the healthful continuing business and service of the freed utility" (*Engineers Pub. Ser. Co.* v. *SEC*, *supra*); and the conclusion of the Commission in its own words that "a registrant seeking to retain an additional system has the burden of showing . . . that such additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system." The Court, therefore, advisedly chose this language as "the Commission's reading of Clause (A)".

We also observe that if Congress had meant to allow retention only when the alternative was extinction, the test of section 11(b)(1)(A) could have been shortened to require a finding that the subsidiary "cannot be operated as an independent system." Furthermore, the Court's emphasis on the likelihood of offsetting gains to competition presupposes the continued operation of the gas companies—we cannot imagine that competition would gain from the elimination of competitors. Finally, it is as impossible to say that "serious impairment" of an additional utilities system means "inability to survive" as to say that "serious injury" means "death."

We take the trouble to distinguish between these two remaining possible approaches because of hints in the Commission's supplemental brief, signed by its General Counsel and argued by its Solicitor, that it sees the test in terms of likely death of a system if divestment is ordered. This brief articulated the "Question Involved" as follows:

"[T]he only question remaining for this Court's consideration is whether the Commission correctly held that petitioners failed to sustain their *burden of proof that NEE'S integrated gas utility system was unable to stand by itself so that substantial hardship to that system's investors and consumers would result from a termination of its relationship with NEES.*"

(Emphasis added.)

This manner of stating the question ignores the "serious impairment" language to which the Court gave first attention in its opinion, but draws exclusively from the language quoted from *Philadelphia Co., supra.* The Commission's wording of the "Question" also makes it clear that a system's inability "to stand by itself" is the event bringing about the "substantial hardship" to investors and consumers. This reading of the test is made more clear by the brief's truncated quotation of *Philadelphia Co.* in saying that that case places "upon petitioners the burden of proving the 'inability of the additional system to stand by itelf.' ". The significance of hardship to investors and consumers is ignored. As final corroboration, it is to be noted that this abbreviated quotation from *Philadelphia Co.* is immediately followed by the statement, "in the light of this test . . . there is no basis for petitioners' arguments that [the statute means] 'such loss [as] would impair the gas companies' ability to compete effectively . . . .' "

It seems too probable to us, therefore, that the Commission, at least in its supplemental brief, now views the statute as requiring divestment unless petitioners can prove that they could not operate as an independent system. Such a test would, we think, read out of the statute the phrase "without the loss of sub-

stantial economies" and would distort the Court's imprimatur on the words "serious impairment".

Even without the burden of proving likely demise, petitioner's burden is, as the Court said, to meet "a much more stringent test" than that of a probable significant loss. But, if the standard to be applied to petitioner is stringent, so is the level of analysis and expertise to be exercised by the Commission. We have, only after a fresh review of all the evidence in the light of this *most stringent* practical standard, concluded that the Commission's opinion does not reveal that application of both reason and experience to facts which merits endorsement as the responsible exercise of expertise.

To make intelligible our difficulties it is necessary to review again the basic facts in evidence and the Commission's express bases for decision. The eight gas companies involved are operated under the general control of the NEES Gas Division, whose officers are responsible directly to the general officers of the holding company and have no duties regarding the electric companies. Seven of the eight operate in areas overlapping the service areas of one or more NEES electric companies and share some facilities, such as office space, meter readers, and accounting personnel and equipment. Both the gas and the electric companies obtain services such as supervision of accounting, purchasing, insurance, legal counsel, labor relations administration, and handling of rate matters from the New England Power Service Corporation, another subsidiary of NEES. In most other respects the gas companies are operated as an independent system, in competition with NEES and other electric companies and with numerous unregulated oil companies.

To support retention, NEES offered the report of a study by a professional utility engineering and consulting firm, Ebasco Services, Inc. (Ebasco), projecting the results of severance on the gas companies, in terms of increased cost of operations. The report presented a detailed description of the organization and operation of the gas companies as of 1958-1959 and as projected after severance, with an estimate of the actual and pro forma costs assigned to each phase of the operations. It concluded that severance would result in recurring additional costs of $1,495,000 per year, on the assumption that the gas subsidiaries would be operated at eight wholly independent companies. A supplemental report reduced the figure to $1,098,600, on the assumption adopted by the Commission that the companies would be operated as a single integrated system.[2] The increase represented primarily the increased cost of the personnel required to duplicate the essential functions now being performed by the service company, and the loss of economies of scale now obtained by joint operation with the electric companies. The latter category included the increase in the cost of customer accounting, the loss of quantity discounts in purchasing, and the substantially increased cost of obtaining insurance against disaster losses.

The Commission rejected the Ebasco report's conclusion, on the grounds (a) that the supplemental report and the witnesses did not satisfactorily explain why the cost of customer billing could not be reduced by using a centralized system for all eight companies, rather than individual billing by each company; (b)

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[2] The latter figure also reflects a reduction of $67,000 to account for a Commission-approved increase in Service Company charges to the gas companies that took effect after 1959.

that the report projected greater increases in the per-customer costs of customer accounting to some gas companies than to the NEES electric companies sharing the same facilities, without satisfactory explanation; (c) that, since the increased cost attributed to customer accounting ($472,100) constituted a large part of the total increase claimed, NEES's failure to justify the whole of that item "substantially impaired" the credibility of the entire estimate; and (d) that the estimated additional salaries and/or positions for the top executive staff of the gas system were also suspect.

Nothing in the Court's opinion causes us to change our views on this issue as expressed in 346 F.2d at 407-09.[3] We do not necessarily criticize the Commission for its skepticism in the specifics; but we do think that even taken together these items constitute at most a basis for reducing the estimated figure by some amount, not for concluding that no increased costs have been proved. In fact, the record here demonstrates conclusively that *some* increased costs are inevitable—the only doubt possible concerns the amount. Furthermore, we think that if the Commission is to use its expertise to assess the impact of the costs in "the total competitive situation", it must at-

[3] The Commission made another error, which we pointed out in our previous opinion, 346 F.2d at 401 n.4, namely, the imposition of too heavy a standard of proof. The Commission persists in saying that "by clear and convincing evidence" means the same thing as "by a fair preponderance of the evidence." With the exception of one court of appeals decision, which we stated before we would not follow, all courts that we know of consistently recognize what to us seems self-apparent, that there is a significant difference. McCormick, Evidence (1954) ch. 36, § 320. For a recent observation on this subject, see *Woodby* v. *INS*, 1966, 385 U.S. 276.

tempt to determine some acceptable figure as a predicate for its assessment. Since, however, the Commission here proceeded on the alternative ground that the full amount of the Ebasco loss estimate ($1,098,600) was proven, we pass further discussion of the amount of losses and turn to their impact.

On this issue, NEES presented evidence that, because of their position at the end of the pipelines, the high cost of manufacturing gas locally, and the absence of storage facilities, the gas companies of New England pay the highest price in the country for the gas they sell, and consequently enjoy little or no price advantage over oil in the important house heating market. Electricity is competitive, apparently, only in a quality market, but has shown better progress than expected. The growth of gas sales in New England, while showing a high percentage increase from a very low base, has lagged substantiallly behind the rest of the country in saturation of the market. Evidence was offered that, although the NEES gas companies have shown a higher rate of growth, of revenues, of increase in saturation, of earnings, and of return on sales expenses, and lower operating expenses than other gas companies in Massachusetts, they have also shown a lower sales revenue per customer. NEES officers and representatives of the Massachusetts Department of Public Utilities testified that the NEES companies operate in areas of slow population growth, as compared to other companies in the state.

To this the Commission responded (a) that as to the geographical disadvantage of operating in New England, the NEES gas companies were in no worse position that the non-affiliated Massachusetts companies which have "apparently" been able to earn a fair return; (b) that the NEES companies, being the sec-

ond largest gas utility operation in Massachusetts, should be able to provide itself with management comparable to the others'; (c) that the NEES gas companies' operating ratio[4] of 76.41 per cent would compare favorably to others in the area; (d) that there was no "specific demonstration" of a causal relation between population growth and gas sales; (e) that the projected losses, even if assumed to be proved, were not substantial within the meaning of section 11 (b) (1) (A), because the ratios of the losses to revenues (4.83 per cent), to operating expenses (6.03 per cent), to gross income (23.28 per cent), and to net income (29.94 per cent)—"the test of substantiality of the estimated loss"—were lower or not substantially higher than similar ratios in prior cases where divestment had been ordered; and (f) that in any event, despite the relatively independent operation of the gas subsidiaries, the operation did not secure the competitive advantages obtainable from single-minded independent management.

We have taken the trouble of including all of the Commission's expressed bases for decision because of our conviction that they do not communicate to us the application of agency expertise in this critical area. For it is here that the delicate judgments—informed by experience, sharpened by close analysis, and ripened into the soundest possible intuition about what is likely to happen—that we call expertise, come into play. Cost accountants, efficiency experts, and engineers can arrive at figures for the likely increases of costs. But a wider-ranging inquiry must be made

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[4] "Operating ratio" is defined as the percentage of total operating deductions (excluding depreciation, amortization of conversion costs, and federal income taxes) to total operating revenues.

to arrive at an educated guess whether the increased burden, falling on a company in the economic and competitive situation of the gas companies involved here, will amount to substantial lost economies—whether its effect will be undue harm to the companies' investors and customers. The importance of care and discrimination in the conduct of this inquiry is underscored by the Supreme Court's clarification of the statutory standard. That the line of "serious impairment" is drawn so close to the point of probable business failure makes the holding company's burden of proof more difficult to carry; but it also makes the risk more substantial that a divestment order based on erroneous findings will result in economic disaster.

With this in mind, we must conclude that the Commission's analysis in the present case does not adequately address the coniderations relevant to the ultimate issue it is required to resolve. To be sure, the evidence summarized above is far from conclusive; and it cannot be denied that there are imponderable factors. At the time of the hearing, the gas companies in New England were considering several ways of reducing their basic costs, such as development of local storage areas, construction of a plant to manufacture liquefied natural gas, and importation of gas by ocean tanker. At the same time they feared that existing oil import restrictions might be loosened. It may be that in the intervening years some of these possibilities have ripened to change the basic competitive circumstances. Nevertheless, we can only conclude on the present record that all gas in New England operates on, as one witness testified, a small cushion. The significance of this is not negated by observing that non-NEES companies in Massachusetts seem to be surviving, for the focus must be on

the specific characteristics of the NEES companies, the only ones affected by the Commission's order. Similarly, that the NEES gas companies together would be the second largest system in Massachusetts is a descriptive, not an analytical proposition. It offers little help in assessing ability to survive. Indeed, the record here is silent on the economic health of the largest system.

A more precise basis for the Commission's decision lies in its use of ratios of the estimated losses to revenues, expenses, and income, in comparison with those adduced from previous divestment cases. The use of these ratios as a test is posited on the undeniable observation that, "in the context of clause (A), the 'substantiality' of asserted losses of economies cannot be tested in absolute terms but rather must be evaluated in relation to total revenues, expenses and income." *Philadelphia Co.*, 1948, 28 S.E.C. 35, 48-49, *aff'd*, D.C. Cir., 1949, 177 F.2d 720. But we observe further that, where the statutory test of substantiality is understood in terms of potential harm to the investor and consumer, even these ratios are significant only as they affect the investment structure of the companies in the particular case, and different companies may be compared only on the assumption that both operate at the same level.

For example, suppose two utility companies, one earning a rate of 6 per cent return on its investment and the other a rate of 5 per cent,[5] both suffer losses amounting to 15 per cent of net income. The result

[5] Rate of return is defined as the percentage of net operating income to the rate base, which is fixed by a rather complicated formula tied generally to the value of capital assets. It may be noted that where only the percentage change is being considered, the amount of the rate base is irrelevant.

would be to reduce the rates of return to 5.1 per cent and 4.25 per cent respectively. It is entirely possible that the former company would be able to maintain its investment position and operate without a rate increase, while the latter would be unable to produce what would be considered a fair return. In fact, in the present case the projected loss to the NEES gas companies amounted to 30 per cent of net income. At the hearing the Commission staff adduced evidence showing that this loss would decrease the companies' rate of return from 6.4 per cent in 1959 to *4.1 per cent* on the projected basis. This may be compared with an average rate of 5.9 per cent for the non-affiliated Massachusetts gas companies, and is below the minimum of 4.5 per cent. Yet, despite the staff's initiative in securing this obviously important data, the Commission failed even to discuss it, except to observe that "apparently" the non-affiliated companies were earning a fair return. We cannot assume, without reason, that a projected rate of return for the NEES companies which is 30 per cent below the average for their counterparts is irrelevant to the issue of "serious economic impairment".

Nor is it sufficient that the loss ratios considered here are "not significantly higher" than the corresponding ratios of companies ordered divested in previous cases. It is obvious from our discussion above that, even if the companies compared were operating at the same level before divestment, the point must come where a small increase in the percentage loss of income crosses the line between a fair return on investment and one so low as to trigger disinvestment or require rate increases. Moreover, where that line is drawn must depend, among other things, on the market position of the company involved. Com-

parison with figures derived from the situations of other companies in other places at other times cannot be conclusive.[6]

In short, we think the standard of "substantial economies", developed by the Commission itself and affirmed by the Supreme Court in this case, requires the Commission—having established its best estimate of the extent of the definable losses likely to result from severance—to address itself to a prediction of the effect of those losses on the economic health of the particular companies involved, in their particular circumstances. Without pretending to define the one true test, we think it clear that relevant factors might include whether the effect of the loss will be (a) to make new equity financing only difficult, or impossible; (b) to reduce the rate of return on investment only slightly, or enough to provoke either disinvestment or a rate increase; (c) to raise the cost of borrowing money a little, or a lot; (d) if rate increases seem probable, to injure deeply, hurt slightly, or af-

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[6] The same reasoning makes irrelevant the comparison of operating ratios, since a business may operate relatively efficiently, yet at a level too low to attract investors.

The comparison-of-ratios test first acquired the status of "the test of substantiality of the claimed losses" in *Philadelphia Co.*, 1948, 28 S.E.C. 35, *aff'd*, D.C. Cir., 1949, 177 F.2d 720, where it was explained as "nothing more than the normal decisional technique of referring to and comparing the facts in prior decisions as a guide in adjudicating the pending case". 28 S.E.C. at 50 n.24. The validity of this technique presupposes that the facts selected for comparison were significant factors in the prior decisions. But it appears to us that the figures selected for use in *Philadelphia Co.* were either ignored or considered mere makeweights in the earlier cases, except in a few where the percentages were so small as to demonstrate that the claimed losses were *de minimis*. The basis for our conclusion is outlined in the Appendix to this opinion.

fect not at all the companies' ability to survive. The Commission considered none of these.

We recognize, of course, that the selection of relevant factors is for the Commission's determination in the first instance, in the exercise of its expertise. But this principle does not isolate the Commission's conclusions from review to determine whether that expetise has been exercised, and, if exercised, communicated. We do not think that the Commission's obligation, which is at the root of the respect to which its expertise is entitled, is satisfied by the invocation of largely irrelevant ratios or of other data concerning other companies, at other times, in other areas, facing possibly different conditions. Were such ratios sufficient, the resolution of divestment cases could be as well entrusted to electric desk calculators as to an expert administrative agency.

Finally, the Commission attributed some significance in this case to its doubt that "such a separation of the gas from the electric operations has been effected as to secure the kind of single-minded management for each that would obtain upon actual divestment." This conclusion was supported by the observation that other Massachusetts companies had been "more effective" in their operations, and by language best considered in the context of its quotation by the Supreme Court:

> "In the present case the Commission said on this phase of the controversy:
>
>> 'Although the NEES Gas Division handles sales and promotional activities and various other matters for the gas subsidiaries separately from the electric companies, final authority on all important matters rests in the top NEES management. The basic competi-

tive position that exists between gas and electric utility service within the some locality is affected by such vital management decisions as the amount of funds to be raised or allocated to the expansion or promotion of each type of service.'

"Competitive advantages to be gained by a separation are difficult to forecast. The gains to competition might well be in the public interest and might well offset the estimated loss in economies of operation resulting from a separation of the gas properties from the utility system. This is a matter for Commission *expertise* on the total competitive situation, not merely on a prediction whether, for example, a gas company in a holding company system may make more for investors than a gas company converted into an independent regime.

"The phrase 'without the loss of substantial economies' is admittedly not crystal clear. But the Commission's construction seems to us to be well within the permissible range given to those who are charged with the task of giving an intricate statutory scheme practical sense and application." 348 U.S. at 184-85.

We have quoted at such length because we think it important to understand precisely the meaning of this part of the Court's opinion. It is possible to read it as saying, in effect, that the Commission's expertise always entitles it to say that the compensating advantages of increased competitiveness outweigh the loss of economies in a given case, and that when the Commission has so spoken, its judgment is unreviewable. Were this, however, the Court's intent, there would have been no occasion for remand for our further de-

liberation. The order of remand would have directed us to affirm the Commission's order.

Furthermore, we note that the shared management on which the Commission posits its language quoted above is common to utility holding company systems, not peculiar to NEES. In effect the Commission says that an independent gas company is always likely to do better than one affiliated with electric companies . *Cf. The North American Co.,* 1945, 18 S.E.C. 611. That is precisely the sort of empirical judgment that the Commission is best qualified to make in the light of its expertise, acquired from dealing with utility company systems over the decades. And we read the Court's opinion as saying that the Commission is entitled to take that judgment into account as justifying a stringent test of "substantiality". But, that done, the general judgment has no independent significance in an individual case. Were this not so, a single statutory standard would be read to set forth two tests: first, is the loss of economies so substantial as to cause serious impairment of the companies' ability to survive; and, second, even if a loss of such magnitude is probable, is its impact sufficiently offset by efficiencies of independent operation so that it is no longer substantial? We cannot escape the conclusion that expert judgment on the impact of gains from increased competition must be involved in answering the first question and that a two-step approach is both artificial and unrealistic.

Absent a finding, therefore, that the company to be divested has been suppressed for the benefit of its affiliates, see *The North American Co., supra,* or that some definable particularized benefit will accrue from divestment, we think the Commission should confine itself to a quantitative analysis of the substantiality

of the proved losses. Since we read the Commission's opinion as improperly attributing independent significance to the generalized competitive advantages here, and since—as we have explained above—we do not read the opinion as expertly evaluating the evidence in the light of the proper meaning of the statutory term, we are compelled to vacate the order of divestment and remand the case for further proceedings and an analysis by the Commission responsive to the difficulties which we have set forth.

## APPENDIX

The following table is derived entirely from figures appearing in the Commission's opinions in five utility divestment cases before 1948.[1] Its purpose is to indicate the significance of those figures in the Commission's reasoning in each case, and their reliability as a guide for the decision of later cases. It may be noted, for instance, that in the three cases where the claimed losses constituted relatively large percentages of net income (Virginia Elec. & Pow. Co.; Gulf gas; St. Louis Co.) the loss estimate was held to be substantially overstated, so that the Commission had no need to consider the "substantiality" of the resulting percentages. Even when the Commission adverted directly to the percentages given it did not attempt a prediction of their economic impact on the companies involved.

We must disapprove entirely of the practice adopted by the Commission after 1948 of comparing the ratios before it with similar ratios derived, not from the opinions in previous cases, but from the papers and records in its files.[2] In those circumstances there can be no assurance that the figures relied upon played *any* part in the decision of the cases.

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[1] *The North American Co.*, 1945, 18 S.E.C. 611 [NoAmer]; *The Middle West Corp.*, 1944, 15 S.E.C. 309 [MidWest]; *Cities Serv. Co.*, 1944, 15 S.E.C. 962 [CitServ]; *Cities Serv. Power & Light Co.*, 1943, 14 S.E.C. 28 [CSPowL]; *Engineers Pub. Serv. Co.*, 1942, 12 S.E.C. 41, *rev'd on other grounds*, D.C. Cir., 1943, 138 F.2d 936, *dismissed as moot*, 1947, 332 U.S. 788 [EngPS].

[2] *General Pub. Util. Corp.*, 1951, 32 S.E.C. 807. We note more in sorrow than in anger that in the present case the Commission included for comparison the 1954 operating figures of the gas properties of the Louisiana Power and Light Co., which were ordered divested in 1953, in *Middle South Util. Inc.*, 1953, 35 S.E.C. 1, *vacated sub nom. Louisiana Pub. Serv. Comm'n* v. *SEC*, 5 Cir., 1956, 235 F.2d 167, *rev'd on other grounds*, 1957, 353 U.S. 368.

| Case | | Amount of Loss Claimed | Per Cent of — *Operating Revenues* | Per Cent of — *Op. Rev. Deductions* | Per Cent of — *Gross Income* | Per Cent of — *Net Income* | Remarks |
|---|---|---|---|---|---|---|---|
| EngPS | Va. E&P Co.[a] | $ 71,500[b] | 3.4 | n/a | 13.2 | 29.5 | *Held,* existing misallocation of costs between gas and electric operations seriously inflated loss figures. |
| EngPS | Savannah E&P | 28,000 | n/a | 2.2 | 3.4 | 5.5 | |
| EngPS | Gulf gas | 42,024[b] | n/a | 8.7 | 25.6 | 32.6 | *Held,* claimed loss figure included cost of unnecessary outside supervision and substantially overstated projected payroll. |
| EngPS | El Paso elec.[c] | 32,800[d] | n/a | 1.8 | 3.6 | 7.4 | |
| CSPowL | St. Joseph elec. | 78,865[b] | 2.7 | 5.2 | n/a | n/a | *Held,* claimed loss figure overstated salaries and included cost of unnecessary personnel. |
| CSPowL | Sheridan Co.[c] | n/a | n/a | 7.0[d] | n/a | n/a | See note [c] below. |
| CSPowL | Rawlins elec. | 7,600[b] | 5.0 | 11.0 | n/a | n/a | *Held,* claimed loss figure substantially overstated, *e.g.,* officers' salaries. |
| CitServ | Arkansas gas | 96,181[d] | 1.1 | 2.7 | n/a | n/a | |
| Midwest | Ky. Util.[c] | 135,000[d] | 1.0 | n/a | n/a | n/a | |
| Midwest | Central Ill.[c] | 80,000[d] | 0.4 | n/a | n/a | n/a | |
| Midwest | Wisc. Power[c] | 146,000[d] | 1.3 | n/a | n/a | n/a | |
| Midwest | Lake Super.[c] | 50,500[d] | 1.9 | n/a | n/a | n/a | |

| Case | | Amount of Loss Claimed | Per Cent of— Operating Revenues | Op. Rev. Deductions | Gross Income | Net Income | Remarks |
|---|---|---|---|---|---|---|---|
| NoAmer | St. Louis Co.[a] | $182,900[d] | 5.8 | 7.4 | 27.6 | 32.1 | Percentages not calculated by Commission or relied on in opinion. Evidence indicated that gas company was being suppressed for benefit of affiliated electric companies. |

[a] The percentage figures were not given in the opinion or relied on by the Commission to support its decision; they are calculated here from other figures given in the opinion.

[b] These figures were held not to be proved and were disregarded, for the reasons indicated under "Remarks".

[c] In these cases it was held that the companies to be divested failed to meet the requirement of geographic compactness, 15 U.S.C. § 79k(b)(1)(C).

[d] These figures were held not proved by the Commission, and displaced by Commission estimates. The Commission's figures are reflected in the percentages.

ALDRICH, *Chief Judge* (Concurring). I concur in the court's opinion with one possible reservation. The court speaks of "hints in the Commission's supplemental brief that it sees the test in terms of likely death of a system if divestment is ordered." The supplemental brief seems to me very explicit; the word "hints" is a judicial euphemism for "statements." If this now stated principle is simply an unwarranted frolic on the part of counsel it is regrettable, but no harm is done. The thought lingers, however, that counsel would not make such statements without reason for so doing, and behind the back of their client. While, like the court, I would not myself read the Commission's opinion as laying down the rule now asserted in the supplemental brief, if in truth this was the principle that the Commission applied, then its findings are even more vulnerable than we have held them to be.

For example, the matter of the asserted reduction in the new system's rate of return, discussed in the court's opinion, which the Commission considered to be of inadequate consequence, might well be insufficient to make bankruptcy imminent, if that is the test the Commission in fact applied. On the other hand, it could well be of great consequence if the test is simply one of serious impairment in the system's financial circumstances.

I would hope that on the new review this matter will be cleared up, and if it so happens that the Commission did weigh the evidence in the light of the test it now espouses in its supplemental brief, appropriate reconsideration will be given.

## Decree

March 31, 1967

This cause came on to be heard on petition for review of an order of the Securities and Exchange Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of divestment of the Securities and Exchange Commission is vacated and the case is remanded for further proceedings not inconsistent with the opinion filed today.

By the Court:

/s/ Roger A. Stinchfield
Clerk.

Enter:

/s/ Aldrich, Ch.J.

## APPENDIX B

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.
March 19, 1964

FINDINGS AND OPINION OF THE COMMISSION

In the Matter of

NEW ENGLAND ELECTRIC SYSTEM

and

ITS SUBSIDIARY COMPANIES
RESPONDENTS

File No. 59-102

Public Utility Holding Company Act of 1935—
Section 11(b)(1)

INTEGRATION OF HOLDING COMPANY SYSTEM

*Non-Retainability of Additional System*

Where registered holding company's subsidiaries conducting electric operations constitute single integrated utility system which holding company elects to retain as its principal utility system, and holding company seeks to retain other subsidiaries conducting gas operations and constituting integrated gas utility system, *held*, gas subsidiaries are not retainable as additional system where evidence is not sufficient to justify finding that "loss of substantial economies" within the meaning of Clause A of Section 11(b)(1) of the Public Utility Holding Company Act would be incurred by gas system if its retention were not permitted.

*Retainability of Other Business*

Service company controlled by registered holding company, *held*, retainable as reasonably incidental or economically necessary or appropriate to operation of principal electric utility system controlled by holding company.

APPEARANCES:

*John R. Quarles*, *James Vorenberg*, *Richard B. Dunn*, and *William D. Andrews*, for New England Electric System and its subsidiary companies.

*David N. Brackman*, *Herbert Baer* and *Edward G. Seferian*, for the Massachusetts Department of Public Utilities.

*Solomon Freedman*, *Aaron Levy*, *Frederick Zazove* and *William R. Nowlin*, for the Division of Corporate Regulation of the Securities and Exchange Commission.

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By Whitney, Commissioner

This is the final phase of proceedings instituted by us under Section 11(b)(1) of the Public Utility Holding Company Act of 1935 ("Act") for the purpose of determining the extent to which the electric, gas, and other operations of the holding-company system of New England Electric System ("NEES"), a registered holding company, may be retained under common control.

We previously found that the electric utility assets of the NEES subsidiaries meet the definition of a single integrated public-utility system,[1] and NEES has elected to retain those assets as its principal sys-

[1] *New England Electric System*, 38 S.E.C. 193 (1958).

tem. The chief remaining issue now before us is whether the gas utility subsidiaries of NEES, which concededly constitute a single integrated gas utility system as defined in the Act,[2] may also be retained as an additional integrated utility system under the standards prescribed in Section 11(b)(1) of the Act.

Hearings were held at which evidence in support of retention was presented by NEES and its subsidiaries ("respondents") and by the Department of Public Utilities of the Commonwealth of Massachusetts ("Massachusetts DPU") and evidence in opposition to retention was adduced by our Division of Corporate Regulation ("Division"). Proposed findings and briefs were filed, and we heard oral argument. Our findings are based on an independent review of the record.

*Description of the NEES System*

NEES is a holding company controlling seven electric utility subsidiaries and eight gas utility subsidiaries. It also owns thirty percent of the outstanding stock of Yankee Atomic Electric Company through one of its electric utility subsidiaries and all the common stock of New England Power Service Company ("NEPSCO"), which provides various

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[2] Section 2(a)(29)(B) of the Act defines an integrated gas utility system as ". . . a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation: *Provided,* That gas utility companies deriving natural gas from a common source of supply may be deemed to be included in a single area or region."

services to the entire system. The retail electric operations serve 824,000 customers in the states of New Hampshire, Massachusetts, Rhode Island, and Connecticut comprising a franchise area of about 4,600 square miles with a total population of over 2,300,000 people. As of December 31, 1958, the gross investment in electric plant and equipment was approximately $600,000,000 and gross revenues from sales of electricity in 1958 were approximately $143,000,000.[3] The NEES gas subsidiaries provide retail service to about 237,000 customers in Massachusetts only, in an area of 660 square miles with a population of approximately 1,032,000 people. Of this gas franchise area, about 494 square miles, or 75%, is also part of the franchise area of NEES' electric subsidiaries, and approximately 78% of the gas customers are also served with electricity by the NEES electric companies. The NEES gas subsidiaries and NEES' ownership of their common stock are as follows:

| Company | % Common Stock Ownership by NEES |
|---|---|
| Central Massachusetts Gas Company ("Central Massachusetts") | 100.00 |
| Lawrence Gas Company ("Lawrence") | 90.43 |
| Lynn Gas Company ("Lynn") | 93.76 |
| Mystic Valley Gas Company ("Mystic") | 99.41 |
| North Shore Gas Company ("North Shore") | 97.52 |
| Northampton Gas Light Company ("Northampton") | 100.00 |
| Norwood Gas Company ("Norwood") | 99.38 |
| Wachusett Gas Company ("Wachusett") | 100.00 |

[3] The basic figures in the record are for the year ended December 31, 1958, the latest year for which audited financial statements were available at the time of the hearings, and 1958 has been used as a test year for the purposes of these proceedings.

Most of these gas properties were acquired by NEES in the period from 1926 to 1931. As of December 31, 1958, the NEES investment in gross gas plant and equipment was approximately $56,300,000 and gross revenue from gas sales in 1958 was approximately $22,700,000. The bulk of the gas sold by the NEES subsidiaries is natural gas produced in the southern United States, principally Texas, and purchased from pipeline companies that deliver it to Massachusetts.[4] Each of the gas subsidiaries also owns and operates facilities for the production of manufactured gas for peak-shaving and emergency stand-by purposes.

After an attempt to sell the gas properties in the early 1950's which was not consummated because of the prospective purchaser's inability to obtain required financing, in 1952 NEES separated various aspects of the activities of the gas subsidiaries from those of the electric companies. It established a Gas Division with headquarters at Malden, Massachusetts,[5] to supervise the 8 gas companies. The executive head of the Gas Division is also president of each of the gas companies and the staff of that Division are all part-time employees of each of the gas companies, and the salaries of those persons are paid pro rata by those companies. The Gas Division has four functional departments—management, marketing and supply, operations, and merchandising—and provides centralized service to the gas companies

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[4] Seven of the gas companies purchase natural gas from one pipeline, and the remaining company purchases such gas from another pipeline. About 98% of the natural gas is purchased from the first pipeline company.

[5] All of the gas companies are within 48 miles of Malden, except one which is 80 miles distant.

with respect to such matters as gas acquisition and distribution, engineering, sales promotion, and new business development. Each of the gas companies has a vice-president and general manager who is in immediate charge of the company and reports directly to the head of the Gas Division; the latter, in turn, is responsible to the NEES top management.

Other aspects of the gas and electric business have continued to be handled on a joint basis. Such joint activities include treasury and accounting services, meter reading, customer billing, labor negotiations and administration of employee programs, procuring insurance, purchasing operations, and joint use of office and other space and equipment. Some of these services are performed by NEPSCO on a contract basis with the individual system companies. NEPSCO's services include supervision of local accounting departments, preparation of tax returns and regulatory reports, and handling of rate, personnel and public relations matters. In 1958 NEPSCO's charges to the gas companies aggregated $317,000.

*Statutory Standards*

Section 11(b)(1) of the Act imposes requirements for geographic and economic integration which were designed to eliminate evils that Congress found to exist "when the growth and extension of holding companies bears no relation to . . . the integration and coordination of related operating properties."[6] Congress recognized that in the absence of clearly overriding considerations a utility system should have a management single-mindedly devoted to advancing the interests of its investors and consumers and not

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[6] Section 1(b)(4) of the Act.

engaged, through the means of the holding company device, in operating other separate or competing utility or non-utility business. It accordingly laid down the basic requirement in Section 11(b)(1) that registered holding companies and their subsidiaries limit their operations to a single integrated public utility system and any other businesses reasonably incidental or economically necessary or appropriate to the operations of such system. Exemption from this requirement was provided in exceptional cases meeting specific geographic and economic tests. Under Clauses A, B and C of that Section, we must permit a holding company to continue to control one or more additional integrated public utility systems if we find that:

> "(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;
>
> "(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and
>
> "(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation."

It is well settled that gas properties and electric properties, since they pertain to different and competing utility businesses, do not constitute a single integrated public utility system,[7] and as noted NEES

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[7] See *Columbia Gas & Electric Corp.*, 8 S.E.C. 443, 462-63 (1941); *The United Gas Improvement Co.*, 9 S.E.C. 52, 77-83

concedes that its electric and gas properties constitute two separate integrated public utility systems. Since NEES has elected to retain the electric properties as its principal system, the gas properties can be retained as an additional system under NEES' control only if the tests of Clauses A, B, and C above are satisfied. There is no question under Clauses B and C. Since all the NEES gas subsidiaries are located within Massachusetts, the standard of Clause B is met. Also the Division acknowledges, and we find, that the size of the combined gas and electric operations is not so large as to raise any substantial question under the standards of Clause C with respect to the advantages of localized management, efficient operation, and the effectiveness of regulation. The issue remains, therefore, whether continued control by NEES of the gas companies is necessary to prevent the loss of substantial economies within the meaning of Clause A.

Clause A was intended to limit the retention of utility systems in addition to the principal system controlled by a holding company to situations where it could be shown that the additional systems were integrated in nature and "were so small that they were incapable of independent economic operation"[8]

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(1941); *The North American Co.*, 11 S.E.C. 194, 215-16 (1942), aff'd on other grounds *sub nom. North American Co.* v. *S.E.C.*, 133 F.2d 148 (C.A. 2, 1943); *Philadelphia Co.*, 28 S.E.C. 35 (1948), aff'd *sub nom. Philadelphia Co.* v. *S.E.C.*, 177 F.2d 720, 723 (C.A.D.C., 1949).

[8] Remarks of Senator Wheeler following pasage of the Act, 79th CONG., REC. 14479 (1935): "After considerable discussion the Senate conferees concluded that the furthest concession they could make would be to permit the Commission to allow a holding company to control more than one integrated system if the additional systems were in the same

and had a "real economic need" for management together with the principal system.[9] Congress was aware that some loss of economies would usually result from the separation of jointly controlled utility systems,[10] but considered that continued joint management should be permitted only where separation would entail a loss of economies which would be substantial in the sense that they were important to the ability of the additional system to operate soundly. As stated by the United States Circuit Court for the District of Columbia:

> "Substantial economies," means something different and, we think, something more than substantial savings in operational expenses. Congress could have said that the divorcement shall not be decreed if the controlling utility or the controlled utility show at a hearing that the cost to operate the latter separately from the former would be substantially greater. If the Act can be construed as meaning just that, then

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region as the principal system and were so small that they were incapable of independent economical operation. . ."

[9] H.R. Rep. No. 1903, 74th Cong., 1st Sess., p. 71 (1935). See also *The North American Co.* v. *S.E.C.*, 327 U.S. 686, 696-97 (1946): "In essence [Section 11(b) (1)] confines the operations of each holding company system to a single integrated public utility system with provision for the retention of additional systems only if they are *relatively small . . . and unable to operate economically under separate management without the loss of substantial economies.*" (Emphasis added.)

[10] See Hearings before Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess. (1935), Pt. 2, pp. 1249, 1402-03, 1530-31, Pt. 3, pp. 2257-77, and before Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess. (1935), p. 65.

> the severance ordered here is wrong. "Substantial economies" must mean, as was said in *North American Co.* v. *Securities and Exchange Commission*, 2 Cir., 133 F.2d 148, 152, "important economies." The required *importance* must relate to the healthful continuing business and service of the freed utility. But Congress was not so much concerned with the profit motive of utilities as with the evils that had become prevalent through combinations of utilities. It was first concerned with the wiping out of the evils which the practice of utility combinations had produced, and Congress only consented to dull the blade of its chosen weapon in proved hard cases. (Italics in original.)[11]

In light of the legislative background, as buttressed by court interpretation, demonstrating that Clause A was meant to provide for a limited exception to the general policy expressed in the Section, we have held that the clause must be strictly construed and that a registrant seeking to retain an additional system has the burden of showing by clear and convincing evidence that such additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system.[12]

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[11] *Engineers Public Service Co.* v. *S.E.C.*, 138 F.2d 936, 944 (C.A.D.C., 1943).

[12] *Engineers Public Service Co.*, 12 S.E.C. 41, 60 (1942); *Philadelphia Co.*, 28 S.E.C. 35, 45-47 (1948), aff'd *sub nom. Philadelphia Co.* v. *S.E.C.*, 177 F.2d 720 (C.A.D.C., 1949); *Middle South Utilities Inc.*, 35 S.E.C. 1, 11 (1953); *The North American Co.*, 11 S.E.C., 194, 208-9 (1942), aff'd on other grounds *sub nom. North American Co.* v. *S.E.C.*, 133 F.2d 148 (C.A. 2, 1943); *Cities Service Power & Light Co.*,

*Estimated Loss of Economies from Severance of Gas System*

In support of their position that severance of the gas subsidiaries from the NEES system would result in the loss of "substantial economies" within the meaning of Clause A, respondents rely essentially upon a study made for them by Ebasco Services Incorporated ("Ebasco"), management consultants with extensive experience in the utilities field, which showed that severance would bring an increase in operating costs. Based on Ebasco's supplemented study,[13] respondents' estimated increase in annual

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14 S.E.C. 28, 137 (1943); *The Middle West Corp.*, 15 S.E.C. 309, 318 (1944); *Cities Service Co.*, 15 S.E.C. 962, 984 (1944).

[13] The study as initially presented assumed that each of the gas companies would be operated separately, it being respondents' view that, notwithstanding the gas companies are presently operated as a single integrated public utility system, the fact that they might be disposed of individually or in groups made it proper to consider the increase in costs which would be incurred under individual operation. Following objections by the Division that the proper approach required the assumption that the gas companies would continue to be operated together as a single system, rather than separately, the study was supplemented so as to provide for a Central Organization for the eight gas companies after severance. The study, as thus modified, indicated the estimated increase in annual operating costs of the gas system after severance would be $329,400 less than the increase estimated on the initial assumption of eight separate gas companies without any Central Organization.

It would be inappropriate to give any weight to the estimates of increased costs to the gas companies on the assumption of separate operations by each of them after severance. Both we and the courts have held that the loss of economies to be considered under Clause A is that pertaining to the additional integrated system sought to be retained (See *Engineers Public Service Co.* v. *S.E.C.*, *supra* note 11 at 944; *The North Ameri-*

operating costs of the gas system after severance would be $1,165,600.[14]

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*can Co.* v. *S.E.C.*, *supra* note 12 133 F.2d at 152; *Philadelphia Co., supra* note 12, 28 S.E.C. at 52; *General Public Utilities Corp.*, 32 S.E.C. 807, 838-9 (1951)), and we find no basis for departing from this established interpretation of the Act in this case. Moreover, we noted in the *General Public Utilities* case at p. 835, note 33: "The severance study also estimated the 'loss of economies' upon the assumption that each of the gas divisions was a separate integrated public utility system. Since we have determined that the gas properties constitute a single integrated public-utility system, we have given no consideration to this aspect of the study."

Respondents' assertion that a sale of the gas properties as a single system may be difficult if not impossible to achieve is not borne out by the record and overlooks the fact that in 1951 NEES obtained three bids for its gas properties as a whole, which were then more extensive than those now held, even though as has been indicated the contract which was signed with the highest bidder was subsequently terminated because of the latter's failure to arrange necessary financing. Moreover, it fails to consider other methods of divestment of the gas system as a whole. Thus, NEES' stock holdings in the gas companies could be placed in a new company the stock of which could be sold or distributed as dividends to the NEES stockholders over an appropriate period of time.

[14] The study also estimated that the costs of the NEES electric subsidiaries would be increased after severance by $804,800 per year. However, such increase is not a factor which could justify retention of the gas system if it is found that the latter can be economically operated independently of NEES. *General Public Utilities Corporation*, 32 S.E.C. 807, 838-39 (1951). The thrust of the statute is the limiting of interstate utility holding company operations to a single integrated utility system managed exclusively in the interests of its own investors and consumers and the restricting of ownership or domination of such a system by interests principally engaged in other activities. The Act is not directed at preserving the benefits which the principal activity derives from

In analyzing the Ebasco estimate of increased costs to the gas system, it is necessary at the beginning to make a downward adjustment in the amount of $67,000, the amount by which NEPSCO's charges to the gas companies in 1958 would have been increased had a revised basis of payments authorized by us at the end of 1959 been in effect in 1958.[15]

We accordingly turn to the questions of whether the Ebasco estimate, thus reduced to $1,098,600, is an acceptable basis on which to determine the present issues and whether it indicates that the test of Clause A is met. The Division contends that the estimate is not valid because it attributes excessive amounts of expenses to the *pro forma* combined gas operations and that, even assuming increased costs as estimated, they do not represent the loss of substantial economies warranting retention of the gas properties under common control with the NEES electric system.

The Ebasco estimate is inadequately supported in a number of important aspects and leaves considerable doubts which respondents have not satisfactorily overcome in the record. Of the total estimated increase in the expenses of the gas companies after severance, $472,100 is attributed by Ebasco to so-called treasury and accounting costs, which comprise the categories of customer accounting, general ac-

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the joint ownership with the other activities. Moreover, it may be noted that in any event the asserted $804,800 loss of economies to the electric system cannot properly be viewed as "substantial" in light of the fact that it is but 0.56% of that system's electric operating revenues and 0.76% of its electric operating revenue deductions before Federal income taxes.

[15] Under the revision approved in 1959, NEES's payroll and related expenses were transferred to NEPSCO and were allocated to the companies benefiting from the services according to a designated formula.

counting, machine accounting, stores accounting and miscellaneous services. The largest single item is with respect to customer accounting, as to which an increase in costs is estimated in the amount of $415,600 or approximately 40% of the total $1,098,600 estimated increase. In light of the fact that the supplemented Ebasco study, which assumed that the gas system would be operated on a combined basis, estimated the same increase in customer accounting costs as appeared in the original Ebasco study, which was based on the assumption that the companies would be operated separately, and in light of respondents' and Ebasco's failure adequately to explain why combined operations would not result in lesser amounts for such costs, we conclude that the $415,600 figure is overstated.

More specifically, one of the important items making up the estimated increase in the cost of customer accounting after severance is customer billing. Ebasco projected the gas billing costs on the basis of separate billing operations by each of the gas companies. Its estimate provides for the employment of additional personnel and rental of additional equipment by those companies to do their own billing.[16] At present, gas billing is done on a combined basis with one or more of the NEES electric companies in the case of each of the gas companies except Norwood, the smallest of the companies.[17] However, respondents have not

[16] The exact cost attributable by Ebasco to the additional billing personnel and equipment in the case of each of the gas companies is not identified in the estimate, but in the case of Mystic and Lynn they would total $34,700.

[17] Wachusett and Central Massachusetts have their billing done by the NEES Central District Treasury Organization at Worcester. The billing for Lawrence is done jointly with that of Merrimack Electric Co. Lynn and Lynn Electric Company

given any satisfactory reason why at least some form or forms of combined billing procedure could not be employed advantageously by the gas companies, in light of the fact that their aggregate of 237,000 customers is located in a relatively compact area.[18]

Also inadequately explained and casting doubt on the estimates of increases in customer accounting expenses is the disparity between the increases attribuated to the gas companies and those attributed to the electric companies. Thus, for example, in 1958 the cost of customer accounting jointly performed for Northampton and Northampton Electric Lighting Company was allocated $17,000, or $2.12 per customer, to the gas company, and $34,200, or $3.60 per customer, to the electric company; whereas under the *pro forma* estimates, the gas company's costs after severance would amount to $48,400, or $6.03 per customer, representing an increase of 184%, and those of the electric company would be $38,500, or only $4.05 per customer, an increase of 13%. Even accepting NEES' contention that customer accounting costs should be viewed together with the other treasury and accounting costs, a substantially similar disparity appears. Total treasury and accounting

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and Northampton and Northampton Electric Company also have joint billing operations for their respective gas and electric customers. Mystic's and North Shore's billing is done at Malden, together with the billing for Suburban Electric Company.

[18] The testimony of respondent's Ebasco witness clearly indicates that centralized billing is predominant in the utilities industry, and that savings would be effected thereby. However, although he expressed the opinion that central billing would not effect "too substantial" a saving for the severed gas companies, no attempt was made to determine whether, and the extent to which, such savings would be substantial.

payroll costs of Northampton, according to respondents' estimates, would increase by 85% to $89,300, or $11.13 per customer, while those of the Northampton Electric Company would increase by only 24% to $88,900, or $9.35 per customer. Again in the case of Lynn and Lynn Electric Company, which jointly serve approximately the same territory and a comparable number of customers, and which have done their treasury and accounting work jointly, in 1958 the payroll costs allocated to the gas company amounted to $228,300, or $5.58 per customer, and those charged the electric company were $64,000, or $8.02 per customer. Under respondents' estimates the *pro forma* costs would increase by 71% to $390,133, or $9.53 per customer, for the gas company and only by 22% to $445,323, or $9.81 per customer for the electric company. The record fails to indicate the validity of these disproportionate effects on the customer accounting and the total treasury and accounting costs of the gas and electric companies upon severance. These areas of expense, in general, are related to the number of customers served and not the type of utility business conducted.

In view of respondent's burden of proof and the absence of a persuasive explanation on the record, Ebasco's failure to consider employment of combined billing procedures and its inadequately explained disparate treatment of certain effects of severance on the gas and electric companies, respectively, substantially impair the credibility and preclude the acceptance of its estimate of a $472,100 increase in treasury and accounting costs and, in turn, of its over-all estimate of increased costs (of which that figure is a material part) in the determination of whether severance would result in a substantial loss of economies.

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Respondents contend that in addition to the estimated increased expenses to which they have assigned dollar amounts there will be other significant losses as a result of severance which are not measurable in dollars. They assert in particular that there would be a loss of experienced administrative, supervisory and long-range planning personnel and services. However, the Ebasco study purportedly estimated the costs of providing organizations for the gas companies which would supply appropriate performance and standards.[19] Moreover, even assuming there would be some "intangible" losses, they must be regarded as part of the over-all effects of severance which normally accompany any reorganization of operations and which Congress must have anticipated when it provided that, other than in exceptional cir-

[19] The Central Organization for the gas companies provided for under the supplemental Ebasco study is estimated to have an annual cost of $574,000 and would include executive and supervisory officials and personnel. It would be headed by a president with an annual salary of $40,000, as compared to the $25,000 salary paid in 1958 to the President of the NEES Gas Division, who is also president of the eight gas subsidiaries. A new position of Executive Vice President would be created, with the incumbent, whose duties would include assisting the president and supervising the other executives, receiving a salary of $25,000. Like the NEES Gas Division, it would have three assistants to the president and a sales manager, with functions and salaries similar to those at present except that the latter's salary would be $17,500, representing an increase of $4,000 per year, and reflecting additional sales promotion duties which would be delegated to him by the president. Twelve additional employees would be provided to handle public and personnel relations and safety and purchasing matters. The salaries of these latter employees would total $87,000, approximately the same amount paid in 1958 as salaries to locally employed personnel and NEPSCO for similar services.

cumstances, separate utility systems should be under separate control. Further, we are unable to accept the suggestion that the NEES integrated gas system, the second largest gas utility operation in Massachusetts, would not be able to provide management and service comparable to that provided by other gas utilities in the state.[20] In that effort it would also have the benefit of the experience in unified gas operations gained by the Gas Division since its formation in 1952.

Even were we to accept the $1,098,600 estimate of loss of economies to the NEES gas companies, it would not lead us to conclude that such a loss is so substantial, when compared with the loss of economies involved in prior divestment cases and viewed in light of the objectives of the Act, as to warrant retention of the gas properties under common control with the NEES electric system. Although that amount is larger than the amounts involved in prior severance cases, we have previously pointed out that the test of the substantiality of the estimated loss is not in absolute terms but rather in relation to total

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[20] See *Cities Service Co.*, 15 S.E.C. 962, 982 (1944), where in rejecting a contention that deprivation of the services of a system service company would result in loss of substantial economies, we observed that:

> "to accept an estimate of present benefit from services rendered by system service companies as a measure of economies which would be lost as a result of independence requires us to assume that financial severance will cast operating units completely adrift, incapable of providing themselves with comparable benefits as cheaply either directly or through mutual arrangements with other operating units. We cannot make that assumption."

See also *The North American Company*, 11 S.E.C. 194, 210 (1942).

revenues, expense and income.[21] In the instant case, the amount of the estimated loss of economies would be equal to 4.83% of the gas system's operating revenues, 6.03% of operating revenue deductions (excluding federal income taxes), and 23.28% of gross income and 29.94% of net income before federal income taxes. These ratios are lower or not significantly higher than corresponding ratios of gas systems whose divestment we have required on the ground that the estimated loss of economies was not substantial within the meaning of Clause A.[22]

Respondents and the Massachusetts DPU argue that an increase in operating costs would have an exceptionally adverse impact in the case of the NEES gas subsidiaries and therefore should be viewed as more serious than an equal dollar amount of increases in other cases because of the highly competitive position of gas in relation to fuel oil in the Massachusetts area. They point out that natural gas is piped from Texas and the price is higher in the

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[21] *Philadelphia Co.*, 28 S.E.C. at 49; *General Public Utilities Corp.*, 32 S.E.C. at 837.

[22] Attached as an Appendix is a table which compares the adjusted Ebasco estimate of loss of economies to the NEES gas subsidiaries with the estimated losses in the prior cases where similar computations were made, in all of which we ordered divestment of the additional system. We do not attribute any comparability to the present case to the gross income and net income ratios of the gas properties of Jersey Central Power & Light shown in that table, which are substantially higher than those of the NEES gas group, because the gross income of Jersey Central's gas department prior to any severance adjustments was found to be so low as to represent an unusually low rate of return on the amounts invested in that property. See *General Public Utilities Corp.*, 32 S.E.C. 807, 837 (1951).

New England area than in any other part of the country, whereas oil is brought in by tanker and its price is virtually the same as or lower than in any other part of the United States. The chief market for gas in the NEES area is residential space heating, and Ebasco estimated that the annual cost of gas for heating a typical New England house is $166, as compared with the cost of oil of $173, whereas in other parts of the United States the differential ranges from $27 to $118 in favor of gas. It is contended that an increase in the cost of gas operations as a result of severance would force an increase in gas rates to customers, and that such an increase would impair the slight competitive advantage now held by gas.

However, even assuming that the described competitive conditions in Massachusetts will continue to prevail, despite efforts to improve the cost position of gas through such means as storage of off-peak natural gas, those conditions obtain generally throughout Massachusetts. There is no evidence that they do not affect in the same manner other independent gas utility companies in the state which nevertheless have been able to conduct their operations and, apparently, earn a fair return without the alleged advantages of common control with electric utilities by a holding company. The situation of the independent companies is different, respondents contend, because the opportunity for increased sales in the NEES gas service area is limited by a more moderate rate of economic growth, population increase, and suburban housing construction than in other parts of the state.[23] However, respondents

[23] Respondents point out that between 1950 and 1960 the population in the NEES franchise areas increased by only

failed to show that, because of these factors, the impact of severance would be such that the combined NEES gas operations, which are larger than those of most of the other gas utility companies in Massachusetts, would be unable to compete effectively with oil, even though the nonaffiliated companies are able to do so.[24]

Moreover, the operating ratio[25] of the NEES gas system after severance of 76.41% would be more favorable or only slightly higher than that of nine nonaffiliated Massachusetts gas companies selected by respondents for comparison that have no joint electric operations, which have a composite ratio of 79.14% and median and mean ratios of 74.87 and 76.35%, respectively.[26] In light of the fact that the operating

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11% while in the franchise areas of seven independent Massachusetts gas companies used by the Division for comparison (see p. 13, *infra*) the increase was 18%.

[24] Of 12 nonaffiliated Massachusetts gas companies which respondents selected for comparison with NEES, only one exceeded the NEES gas utility system in size of gross plant, gross annual revenues, and number of customers. It may also be noted that the NEES gas system is substantially larger than systems we have ordered divested in prior cases, such as those whose pertinent data are set forth in the Appendix table. We found that several of those systems in turn were larger than companies that had demonstrated conclusively their ability to operate effectively free of holding company control. See *Philadelphia Co.*, 28 S.E.C. 35, 46-7 (1948); *Middle South Utilities, Inc.*, 35 S.E.C. 1, 11 (1953).

[25] "Operating ratio" as used above is the percentage of total operating revenue deductions (other than depreciation, amortization of conversion costs, and Federal income taxes) to total operating revenues.

[26] The nine independent Massachusetts gas companies and their operating ratios are: The Berkshire Gas Co., 74.06%;

ratio of the NEES gas companies, even considering Ebasco's estimated increased costs, would still be substantially favorable in comparison with the independent Massachusetts companies, we would be entering the realm of speculation at this time to assume that rate increases would ensue from severance. Especially is this so in view of our finding that these increased cost estimates, on which respondents and the Massachusetts DPU rely in stating that gas rates would have to be increased upon severance, are overstated.

We also find no merit in respondents' contention that in order to avoid reduction of gas net earnings after severance, gas operating revenues would have to be increased by additional revenue of approximately \$1,500,000, consisting of \$1,098,600 to offset the estimated increased costs plus about \$400,000 to offset, on a two-dollar for one-dollar basis, the asserted nonavailability to the gas companies of an estimated \$200,000 of tax reductions presently resulting from joining in the consolidated income tax return filed by the NEES system. The test of Section 11(b)(1) governing the retainability of additional public-utility systems is not based upon reduction of net earnings upon severance but rather solely upon whether the increased operating costs occasioned by severance are "substantial." With respect to the claimed nonavailability of consolidated tax savings, we have held on prior occasions that any such saving is not related to any operational function of retention of control and is not an appropriate

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Boston Gas Co., 82.5%; Brockton Taunton Gas Co., 74.59%; Buzzards Bay Gas Co., 73.77%; Fall River Gas Co., 77.31%; Haverhill Gas Co., 74.87%; Lowell Gas Co., 75.75%; Springfield Gas Light Co., 74.65%; and Worcester Gas Light Co., 79.64%.

factor upon which to determine retainability of an additional system.[27] In addition, it does not appear that a gas holding-company system that would emerge after severance would not be able to secure all or substantially all of the tax benefits now available to the gas companies under NEES ownership. Moreover, respondents did not show any reason why the consolidated debt ratios (including the effect thereon of NEES' own corporate debt) that now appertain to the NEES gas companies and affect the system's consolidated income tax liability would not also be imputed to the new gas holding-company system.

Respondents have also argued that in reaching the conclusion in prior cases that estimated losses of economies were not substantial we considered that separation of the management of the gas or other properties of the additional system from that of the principal system would result in offsetting advantages. They assert that there would be no such advantages in separation of the NEES gas companies because, as a result of the creation of the NEES Gas Division in 1952, the benefits that flow from centralized and separated operation of the gas business have already been achieved.

We cannot accede to the view that such a separation of the gas from the electric operations has been effected as to secure the kind of single-minded management for each that would obtain upon actual divestment. Although the NEES Gas Division handles sales and promotional activities and various other matters for the gas subsidiaries separately from the electric companies, final authority on all important

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[27] *Philadelphia Co.*, 28 S.E.C. 35, 73 (1948); *Cities Service Co.*, 15 S.E.C. 962, 985 (1946).

matters rests in the top NEES management. The basic competitive position that exists between gas and electric utility service within the same locality[28] is affected by such vital management decisions as the amount of funds to be raised for or allocated to the expansion or promotion of each type of service. It is asserted by respondents and the Massachusetts DPU that NEES has made all such decisions with full regard for the needs of the gas companies, has vigorously promoted the gas business, and has not suppressed that business in favor of the NEES electric business. The Division points to the fact that of twelve independent Massachusetts gas companies used by respondents for comparison with NEES, seven which the Division considered comparable had substantially higher mcf sales and revenues per customer than the NEES gas companies[29] and their cus-

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[28] See *Philadelphia Co.*, 28 S.E.C. at 48; *Engineers Public Service Co.*, 12 S.E.C. 41, 58 (1942).

[29] The NEES gas companies sold 44.2 mcf per customer in 1958 while sales of the 7 independent gas companies compared to NEES were 78.8 mcf per customer, or 78% greater. In 1959 the NEES sales were 51.5 mcf per customer compared with sales of 83.7 mcf per customer by the independent group, or 63% greater.

Respondents object to the Division's elimination of Boston Gas Co. in making its comparisons. The Division considered that company not to be comparable to the NEES gas companies because it remained a distributor of lower btu manufactured or mixed gas until 1960, whereas the NEES companies distributed natural gas only. The difference in the nature of the gas sold is a material factor affecting comparability, but even were Boston Gas Company included the over-all comparison would not be substantially changed. Boston Gas Company's total gas sales were greater than those of the NEES group, being 57.0% mcf per customer compared with 44.2 mcf for NEES in 1958, and 62.3 mcf per customer compared with

tomers pay less per mcf of gas consumed than the NEES gas customers.[30] It must be recognized that *prima facie* this disparity in favor of the independent companies, if it is at all meaningful, tends to indicate that the independent gas operations have been more effective than those of NEES gas management. Although the Massachusetts DPU argues that much of this disparity is caused by the difference in population characteristics of the NEES franchise areas and those of the independent companies because the latter had a more rapidly growing suburban residential population, no specific demonstration of the existence or extent of such a causal relation was presented. In any event, it is clear that the determinations respecting the basic interests of the gas companies are made by NEES officials who occupy a dual position in which they must weigh the needs and objectives both of those companies and of the electric companies which represent the principal and most profitable business of the NEES system. On the basis of the facts presented in this case we can-

51.5 mcf for NEES in 1959, although in the area of domestic gas sales, Boston Gas sold less than the NEES group, its sales being 34.0 mcf per customer compared with 34.9 mcf for NEES in 1958 and 37.4 mcf compared with 56.1 mcf in 1959.

Revenue from gas sales by the NEES companies in 1958 was $95.44 per customer compared with $135.19 per customer for the 7 independent companies. In 1959 the comparable figures were $104.49 for the NEES group and $142.10 per customer for the independent group.

[30] The cost of gas to NEES customers in 1958 was $2.16 mcf sold compared with $1.72 per mcf for the independent group, and in 1959 NEES customers paid $2.03 per mcf while customers of the independent gas companies paid only $1.70 per mcf.

not conclude that a management solely interested in and devoted to the gas operations would not be able to advance them more effectively.

Respondents and the Massachusetts DPU further contend that in deciding whether substantial economies would be lost by severance of the gas companies we must accord great if not conclusive weight to that Department's views in favor of the retention of the gas properties within the NEES system. They argue that the Act reflects a Congressional recognition that the desirability of combined gas and electric operations is essentially a local question and indicates a policy of accommodation to the desires of local regulatory authorities on that question. They point to the fact that we have in prior cases granted exemptions from the Act under Section 3 and permitted separation from our jurisdiction pursuant to reorganization plans filed under Section 11(e) of companies having combined gas and electric operations. They cite in particular *Northern States Power Company*[31] which referred to those cases and expressly followed the recommendation of the local regulatory authorities in granting such an exemption.

We of course agree that the views of interested regulatory authorities should always be carefully considered, and have done so in this case. However, we do not view the statutory pattern as contemplating that the standards of Section 11 should yield to the views of state or local authorities whenever the properties whose joint retainability under that Section is in question are gas and electric properties. Section 8 of the Act, to which the Massachusetts DPU points particularly, requires state approval of acquisitions of gas and electric properties to be jointly owned or

[31] 36 S.E.C. 1 (1954).

operated if state law prohibits or requires approval of such combination. However, it merely serves to prevent circumvention of express state restrictions against such acquisitions by imposing a condition of state approval even though acquisitions are otherwise permissible under the standards of the Act, and does not relate to the divestment of properties under the policy embodied in Section 11(b)(1). It must be read together with the provisions of Sections 9 and 10 which impose other conditions to acquisitions that apply even if all state laws are met and which are directed toward and embrace the standards of Section 11. Section 10(c) expressly provides that we shall not approve an acquisition which is unlawful under Section 8 or detrimental to the carrying out of the provisions of Section 11 or which we are unable to find would tend to promote the economical and efficient development of an integrated public utility system. It is clear that the economic and geographic integration objectives of Section 11 were uppermost in Congress' mind in adopting Sections 9 and 10,[32] and that Section 8 was not intended to permit any relaxation of those objectives. There is significantly no reference in Section 11 to considerations of state or local policy, as there is in various other sections of the Act,[33] and the federal policy embodied in that Section is clearly paramount.[34]

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[32] See S. Rep. No. 621, 74th Cong., 1st Sess. (1935), pp. 29-30; H. R. Rep. No. 1318, 74th Cong., 1st Sess. (1935), p. 15.

[33] *Cf.* Sections 6(b), 7(g), 8, 9(b)(1), 9(b)(2), 10(f) and 20(b).

[34] See *Public Service Commission* v. *S.E.C.*, 166 F.2d 784, 787 (C.A. 2, 1948), *cert. denied* 334 U.S. 838.

We do not take the view that the Act expresses a federal policy against combined gas and electric operations as such. The Act is concerned with interstate holding company activities and within that area it prescribes tests of retainability which must be met. In the cases where we granted exemptions or otherwise released jurisdiction despite the existence of combined gas and electric operations, the holding companies involved did not come within that area because they and their subsidiaries were entirely intrastate or were primarily operating companies or because under the Section 11(e) reorganization plan which was to be effected no interstate holding company system with combined operations would survive. In exemption situations we are not required to determine whether the requirements of Clauses A, B and C of Section 11(b)(1) are satisfied; where the applicable geographic and operational requisites are otherwise met our inquiry with respect to the combined operations aspect is limited to determining whether it affirmatively appears that such operations would be detrimental to the public interest or the interests of investors or consumers. The *Northern States* case involved an application by a holding company which was also an operating company for an exemption from the Act pursuant to Section 3(a)(2), which provides for the exemption of a holding company and its subsidiaries where the holding company is predominantly a public utility company. We found that the predominance test and geographic requirements of Section 3(a)(2) were met, and it was on the question of whether the record showed that the exemption would have a detrimental effect that we considered the favorable views of the local authorities and found that they together with other data presented by the applicant overcame the contention of

the Division to the contrary which was supported by a study that we found to be unpersuasive.[35]

In the present case the issue is whether respondents, an interstate holding company system headed by NEES, have made the requisite showing under Clause A of Section 11(b)(1) that the losses from severance of the gas companies would be substantial. As has been stated, respondents rely on the Ebasco study. The Massachusetts DPU which has made no study itself, states that the estimates contained in the study conform to the losses of economies that its own familiarity with the NEES system would lead it to anticipate, and it joins in Ebasco's opinion that such losses would be substantial. We have seen that the study is deficient with respect to its principal item of estimated loss, thus materially impairing its persuasiveness and making it unacceptable. We have also been unable on the basis of the record before

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[35] Respondents and the Massachusetts DPU also cite *Middle South Utilities, Inc.*, 35 S.E.C. 1 (1953), where in proceedings under Section 11(b)(1) the City of New Orleans recommended retention by New Orleans Public Service, Inc., a subsidiary of Middle South whose principal business was electric, of gas and transportation properties and we did not order divestment of those properties. However, one of the factors presented by the City was that it had purchase option rights which would have been lost by severance. It was partly because of that situation that we decided not to order divestment at that time but rather to defer decision on that issue, which is still pending. See S.E.C. 26th Annual Report, 133 (1960). In that same opinion we ordered separation of the gas properties of Louisiana Power & Light Company, another subsidiary, from its electric properties, and we subsequently refused to revoke or modify that order despite the position of the Louisiana Public Service Commission that independent operation of the gas system would increase expenses. *Middle South Utilities, Inc.*, 36 S.E.C. 383 (1955).

us to accept the contention that there would be other significant losses not reflected in the dollar estimates or to find that the gas companies could not be soundly and economically operated independently of NEES, even assuming the validity of the estimates in the Ebasco Study. On the basis of our consideration of the entire record as to the nature and extent of the claimed losses, we cannot find that respondents have met their burden of showing that the test of Clause A for the retention of the gas properties under the control of NEES is satisfied.

*Conclusions*

In view of the foregoing we shall direct NEES to take appropriate action to divest itself of its interests in the system's gas properties.

The remaining issue in these proceedings relates to the retainability by NEES of its interest in NEPSCO. Since it appears that the operations of NEPSCO are reasonably incidental and economically necessary and appropriate to the operations of the integrated electric utility system of NEES, the proceedings will be dismissed insofar as they relate to the retainability of that company.

An appropriate order will issue.

Chairman CARY and Commmissioners WOODSIDE and COHEN join in the above opinion.

Orval L. DuBois
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
March 19, 1964

ORDER REQUIRING DIVESTMENT OF NON-RETAINABLE PROPERTIES AND PERMITTING RETENTION OF SERVICE COMPANY

In the Matter of

NEW ENGLAND ELECTRIC SYSTEM

and

ITS SUBSIDIARY COMPANIES
RESPONDENTS

File No. 59-102

Public Utility Holding Company Act of 1935

The Commission having instituted proceedings pursuant to Section 11(b)(1) of the Public Utility Holding Company Act of 1935 with respect to New England Electric System ("NEES") and its subsidiary companies to determine what action, if any, should be required to limit the operations of the system to a single integrated public utility system and to such additional systems and other businesses as are retainable under the provisions of Section 11(b)(1) of the Act;

The Commission having previously found that the electric utility properties of NEES constituted a single integrated public utility system within the definition set forth in Section 2(a)(29)(A) of the Act and having dismissed the proceedings relating

to that issue while retaining jurisdiction over the remaining issues (38 S.E.C. 193 (1958));

A public hearing having been held after appropriate notice, at which evidence was adduced with respect to the remaining issues whether the gas utility assets of NEES are retainable by NEES as an additional integrated utility system and whether NEES may retain its interest in New England Power Service Company as a business whose operations are reasonably incidental or economically necessary or appropriate to the operations of the integrated electric utility system; and briefs and proposed findings and conclusions having been filed, and oral argument having been heard; and

The Commission having considered the record, and having this day issued its Findings and Opinion herein; on the basis of such Findings and Opinion

IT IS ORDERED, pursuant to Section 11(b)(1) of the Act, that the New England Electric System dispose of the gas utility properties presently controlled by it and terminate its relationship with the following companies by disposing of or causing the disposition, in an appropriate manner not in contravention of the Act or the Rules, Regulations or Orders of the Commission thereunder, of all interests, direct or indirect, which it holds in those companies:

Central Massachusetts Gas Company
Lawrence Gas Company
Lynn Gas Company
Mystic Valley Gas Company
North Shore Gas Company
Northampton Gas Light Company
Norwood Gas Company
Wachusett Gas Company

It Is Further Ordered that the proceedings be, and they hereby are, dismissed insofar as they relate to the issue of whether the operations of New England Power Service Company are reasonably incidental and economically necessary and appropriate to the operations of the integrated electric utility system of New England Electric System and are retainable as such.

It Is Further Ordered that jurisdiction be, and it hereby is, reserved to take such further steps as are necessary and appropriate to carry out the terms of this order.

By the Commission.

Orval L. DuBois
Secretary

| | Engineer Public Service Co. | | | | The North American Co. | | Philadelphia Co. | |
|---|---|---|---|---|---|---|---|---|
| | Gas Properties of Gulf States Utilities Co.—1940 | | Gas Properties of Virginia Electric and Power Co.—1940 | | Gas Properties of The St. Louis County Gas Co.—1942 | | Gas Group—1946 | |
| | Amount | Per cent of estimated loss of economies to: | Amount | Per cent of estimated loss of economies to: | Amount | Per cent of estimated loss of economies to: | Amount | Per cent of estimated loss of economies to: |
| Operating revenues | $638,711 | 6.58 | $1,057,000 | 3.38 | $2,748,770 | 5.85 | $16,656,560 | 3.00 |
| Operating revenue deductions (excluding Fed. inc. taxes) | $444,006 | 9.46 | $ 735,294 | 4.86 | $2,009,757 | 8.01 | $13,197,846 | 3.79 |
| Gross income (before deducting Fed. inc. taxes) | $201,594 | 20.85 | $ 317,890 | 11.25 | $ 742,027 | 21.68 | $ 3,565,357 | 14.03 |
| Net income (before deducting Fed. inc. taxes) | $166,402 | 25.25 | $ 168,412 | 21.23 | $ 661,110 | 24.34 | N.A. | N.A. |
| Estimated loss of economies claimed | $ 42,024 | | $ 35,750 | | $ 160,900 | | $ 500,328 | |

| | General Public Utilities Corp. | | | | Middle South Utilities, Inc. | | NEES | |
|---|---|---|---|---|---|---|---|---|
| | Electric Properties of Northern Pennsylvania Power Co.—6/30/49 | | Gas Properties of Jersey Central Power & Light Company—6/30/49 | | Gas Properties of Louisiana Power & Light Company—1954 | | Gas Properties of 8 Subsidiaries Combined—1958 | |
| | Amount | Per cent of estimated loss of economies to: | Amount | Per cent of estimated loss of economies to: | Amount | Per cent of estimated loss of economies to: | Amount | Per cent of estimated loss of economies to: |
| Operating revenues | $4,027,081 | 1.44 | $4,714,958 | 4.87 | $5,264,186 | 5.18 | $22,752,270 | 4.83 |
| Operating revenue deductions (excluding Fed. inc taxes) | $3,046,479 | 1.90 | $4,235,661 | 5.42 | $4,112,285 | 6.63 | $18,207,191 | 6.03 |
| Gross income (before deducting Fed. inc. taxes) | $ 981,980 | 5.90 | $ 479,477 | 47.84 | $1,151,901 | 23.68 | $ 4,718,864 | 23.28 |
| Net income (before deducting Fed. inc. taxes) | $ 855,101 | 6.77 | $ 202,582 | 113.24 | N.A. | N.A. | $ 3,669,931 | 29.94 |
| Estimated loss of economies claimed | $ 57,890 | | $ 229,398 | | $ 272,816 | | $ 1,098,600 | |

N.A. Not Available

## APPENDIX C

# UNITED STATES COURT OF APPEALS
## For the First Circuit

No. 6332

NEW ENGLAND ELECTRIC SYSTEM, ET AL.,
PETITIONERS

*v.*

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

On Petition for Review of an Order of the Securities and Exchange Commission

Before ALDRICH, *Chief Judge*, SWEENEY, *Chief Judge*, and WYZANSKI, *District Judge*

*John R. Quarles*, with whom *Richard B. Dunn*, *Richard W. Southgate*, *John J. Glessner, III*, and *Ropes & Gray* were on brief, for petitioners.

*David Ferber*, Solicitor, with whom *Phillip A. Loomis, Jr.*, General Counsel, *Ellwood L. Englander*, Assistant General Counsel, *Martin D. Newman*, Attorney, and *Solomon Freedman*, Director, Division of Corporate Regulation, Securities and Exchange Commission, were on brief, for respondent.

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OPINION OF THE COURT

June 4, 1965

ALDRICH, *Chief Judge*. This is a petition seeking to review and set aside a divestment order of the Se-

curities and Exchange Commission pursuant to section 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79k(b)(1), requiring the petitioner, New England Electric System (NEES) to dispose of its gas utility properties by terminating its relationship with its eight subsidiary gas companies. The ultimate question in the case, which the Commission resolved against NEES, was whether divestiture would cause the loss of "substantial economies" within the meaning of the cited section.

Briefly, NEES is a registered holding company controlling, at the time of the hearing, fourteen electric utility subsidiaries and eight gas subsidiaries, with some 824,000 retail electric customers in the states of New Hampshire, Massachusetts, Rhode Island and Connecticut, and some 237,000 retail gas customers in Massachusetts. Seventy-eight percent of its gas customers are also served by the electric companies. Except for certain peaks and emergencies the gas distributed is natural gas supplied by pipe line companies from the southern United States. The gas companies have separate offices and management, but their top officers are responsible to the top officials of NEES. There was a lengthy hearing before an examiner at which NEES sought to show that the cost of divestment to the electric system would be $804,000 annually, and to the gas system, if operated as a single unit after severance, $1,098,000.[1] The Commission held, *inter alia*, that the financial effect upon the electric system was not a relevant inquiry, but that if it was it was not significant. This we do not reach.

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[1] NEES' actual figure was $1,165,000, but the Commission reduced this by $67,000 as a result of a "revised basis of payments" authorized by it. NEES does not presently dispute this adjustment, but points out that the reverse adjustment must be made to the estimated electric system losses.

It also held, which we do reach, that the claimed financial consequences to the gas system were not substantial as it construed the statute, but that if they were they had not been adequately proven.

Basic to its decision, as the Commission recognized at the outset of its opinion, is the meaning of the Act and the standards which it imposed. Briefly, section 11(b)(1) required divestiture unless NEES could satisfy the provisos or exceptions[2] contained in subparagraphs, or clauses, (A), (B) and (C). Clauses (B) and (C) were admittedly met. Clause (A) reads as follows:

> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

Before considering whether the Commission's interpretation of this clause was correct we must determine what its interpretation was. At the beginning of its opinion the Commission stated that to prevent divestiture NEES must show,

> that the additional systems were integrated in nature and "were so small that they were incapable of independent economic operation" and had a "real economic need" for management together with the principal system. Congress was aware that some loss of economies would usually result from the separation of jointly controlled utility systems, but considered that continued

[2] The Commission uses the word "exceptions," and criticizes NEES' word "provisos." NEES' distinction, as we read it, was in response to a heavy burden of proof which the Commission sought to attach to exceptions. See fn. 4, *infra*.

> joint management should be permitted only where separation would entail a loss of economics which would be substantial in the sense that they were important to the ability of the additional system to operate soundly. [Footnotes omitted.]

The Commission then quoted at length from a decision by the Court of Appeals for the District of Columbia,[3] from which it drew the conclusion that clause (A) required a "showing by clear and convincing evidence[4] that such additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment

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[3] *Engineers Public Service Co.* v. *S.E.C.*, 138 F. 2d 936, 944 (1943). This case is extensively relied on in the Commission's opinion without noting that certiorari was granted, 322 U.S. 723 (1944), and the decision subsequently vacated as moot. 332 U.S. 788 (1947). This omission was remedied in its brief. We do not know whether the view of the majority, or the dissent of Judge Soper which accords with ours, would have ultimately prevailed.

[4] The Commission has been criticized before for using this phrase, the court allowing it to pass, however, on the ground that it meant no more than the fair preponderance of the evidence, the ordinary burden of proof. *Philadelphia Co.* v. *S.E.C.*, D.C. Cir., 1949, 177 F. 2d 720, 725. We do not agree. This phrase has a well recognized meaning, and is applied in special cases, such as fraud, *Lackawanna Pants Mfg. Co.* v. *Wiseman*, 6 Cir., 1943, 133 F. 2d 482, 486, or mistake, *Philippine Sugar Estates Devel. Co., Ltd.*, v. *Philippine Islands*, 1918, 247 U.S. 385, 391, as applied in *Aetna Ins. Co.* v. *Paddock*, 5 Cir., 1962, 301 F. 2d 807, 811. The Comission is to be criticized for continuing to use this language, which by its tone suggests to laymen, as well as to lawyers, a heavy burden. We suspect, from other statements in its opinion, that it accurately revealed the Commission's approach. If so, in any future proceedings the Commission should readjust its receptivity as well as its phraseology.

of that system." Lastly, at the end of its opinion, the Commission concluded that on the record it was unable "to find that the gas companies could not be soundly and economically operated independently of NEES, even assuming the validity of * * * [its] estimates."

Thus the statutory phrase, "cannot be operated as an independent system without loss of substantial economies," was said to mean, "incapable of independent economic operation;" "important to the ability * * * to operate soundly;" "so important as to cause a serious impairment of that system;" and "could not be soundly and economically operated."

In *Middle South Utilities, Inc.*, 35 S.E.C. 1, 11 (1953), its most recent decision cited in its opinion for the support of its interpretation, the Commission ordered a divestment because it had not been shown that it would "cause the serious economic impairment of the system *or* that the gas properties could not operate effectively and efficiently under separate ownership." [Italics supplied.] Since presumably the Commission did not intend to voice simultaneously two different standards we read the word "or" as introducing an explanation or equivalency. Essentially this second *Middle South Utilities* phrase is the sole standard that the Commission adopts in its brief before us.

Also may be noted the Commission's statement, in refutation of one of NEES' contentions, that "other independent gas utility companies in the state * * * nevertheless have been able to conduct their operations and, apparently, earn a fair return without the alleged advantages of common control with electric utilities by a holding company."

Taking the record as a whole we find its brief accurate, and that the Commission's interpretation is

that a loss is not "substantial" unless it would render impossible "economical or efficient operation." [5]

As to the correctness of this interpretation we have not considered before the meaning of clause (A), and there is no uniformity of judicial view elsewhere. It is true that in *North American Co.* v. *S.E.C.*, 1946, 327 U.S. 686, 696-7, the court referred to section 11 (b)(1) as permitting retention only of "relatively small [companies] * * * unable to operate economically under separate management without the loss of substantial economies * * *." This was a passing summary, and did not purport to be an exact characterization. The precise meaning was not relevant to the constitutional questions then under consideration, and even if the court's language is not considered ambiguous we do not take it as an attempt to resolve possibly intricate questions of construction. We turn, therefore, to other considerations.

Although we do not regard the legislative history as determinative, we begin there as the Commission makes much of it. Its principal reliance is upon the concluding remarks of Senator Wheeler on the floor after the bill had finally passed both branches. Senator Wheeler stated, *inter alia*, that the act permitted a holding company to retain more than one integrated system only when the additional systems "* * * were so small that they were incapable of independent

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[5] NEES suggests there is no practical difference between preventing economical operation and bankruptcy. The Commission does not address itself to this question. We assume it believes there to be a difference, but except to the extent suggested in fn. 7, *infra*, we cannot find from its opinion what the difference is, or, more important, what is the standard by which uneconomical operation is determined. The very serious problem which this would present we do not reach because we disagree with the Commission's basic interpretation.

economical operation." 79th Cong. Rec. 14479 (Aug. 24, 1935). We may note, at the outset, that only by a most generous interpretation is this statement part of the legislative history. Having come afterwards, it could not have affected the voting. The best reason for considering it as evidence of Congressional intent, see *United States* v. *United Mine Workers*, 1947, 330 U.S. 258, 279-80; *Duplex Printing Press Co.* v. *Deering*, 1921, 254 U.S. 433, 477; *cf. State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.*, D.C.N.D. Ill., 1957, 154 F. Supp. 471, 485, *rev'd on other grounds*, 258 F. 2d 831, *cert. den.* 358 U.S. 947, is accordingly absent.[6] Furthermore, coming from the leading Congressional advocate of strict separation, see *e.g.*, 79 Cong. Rec. 1525, Feb. 6, 1935; *id.*, 4903 (radio address of April 2, 1935); *id.*, 14470, Aug. 24, 1935 (remarks of Senator Norris), it would seem natural to regard it, at that stage of the proceedings, as a self-serving declaration. To the cynically minded it would seem to have been merely a post-contest attempt to raise the score, recapture what had been lost in the compromise with the House discussed *infra*, and to serve, just as is now being sought, to influence

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[6] See Hart and Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tent. ed. 1958) 1285:

"The views of individual members of the legislature as to the meaning of a statute which were not officially communicated to the legislature prior to its enactment are not competent to be considered in determining the meaning which ought to be attributed to the statute."

Nor could it have invited a presidential veto, since the President was a known advocate of a strong bill. See 79 Cong. Rec. 3425-26, 3469-70, March 12, 1935 (Message to Congress); *id.* at 9042, June 11, 1935 (letter to Senator Barkley and Senator Wheeler); *id.* at 14164, Aug. 22, 1935 (letter to Representative Rayburn).

subsequent history. The best that should be said for Senator Wheeler's statement under these circumstances is that it is not to be given the weight to which it might have been entitled if made at another time.

The other pieces of legislative history related in the Commission's brief are a quotation from remarks by Representative O'Connor speaking "of 'a little power plant in Florida' or 'a little plant in Oklahoma' (79 Cong. Rec. 14168, Aug. 22, 1935)" and one from Representative Cooper, "who had opposed the motion, [and] had referred to systems retainable under Clause (A) as 'unprofitable companies * * * too weak to stand alone' (*id.* at 14165-14166)." Examination of Representative O'Connor's full statement rebuts the economic implication the Commission wishes us to attach to the word "little." It is evident that the remarks were addressed to geographical aspects, the absentee landlordism condemned in clause (B). It is true that Representative Cooper was speaking of clause (A). But it seems apparent that as an opponent of the bill he was strategically engaged in blackening it. According to him the compromise was no compromise whatever, a position demonstrably unsound. His interpretation of particular clauses must be read in that light. *Labor Board* v. *Fruit & Vegetable Packers & Warehousemen, Local No. 760*, 1964, 377 U.S. 58, 66.

A much more pertinent characterization of the phrase "substantial economies" is found in the statement of the House Managers attached to the conference report recommending passage of the compromise draft, that the retention of additional systems was to be permitted where there was a "real economic need." H.R. Rep. No. 1903, 74th Cong., 1st Sess., 71. This language, however, is itself ambiguous. Obvi-

ously there would be a real economic need to prevent a loss that would preclude efficient or effective operation. But there could also be said to be a real economic need to avoid any truly sizable financial loss notwithstanding the utility's ability to absorb it and remain efficient in some absolute sense.[7] For reasons we now come to we believe the statute is to be given this more general meaning.

The declaration of legislative objectives is found in section 1(b). Subsection (1) thereof concerns improper accounting practices, capitalization, etc., that may injure investors. Subsection (2) refers to excessive charges and other effects of transactions among companies within a holding company system. It also, together with subsection (3), refers to impediments occasioned by the holding company device to state regulation. We quote in full the remaining subsections, which declare the public interest to be adversely affected,—

> (4) when the growth and extension of holding companies bears no relation to *economy of*

[7] We have already commented upon the Commission's failure to enunciate any standard beyond this broad generalization of economy or efficiency. See fn. 5, *supra*. Possibly its views are partly implied by the points made in its opinion when assuming that an annual loss of $1,098,000 had been adequately established. The first was that while this amount is larger, absolutely, than losses required to be accepted in any previous case, it is not larger relatively. Secondly, that the loss would be only 23.28% of gross income, and 29.94% of net income before federal income taxes. (The word "only" is ours.) Third, that there are "other independent gas utility companies in the state which nevertheless have been able to conduct their operations and, apparently, earn a fair return * * * and * * * compete effectively. * * *" Finally, that it "would be entering the realm of speculation at this time to assume that rate increases would ensue from severance."

> *management and operation* or the integration and coordination of related operating properties; or
>
> (5) when in any other respect there is *lack of economy of management and operation* of public-utility companies *or lack of efficiency and adequacy of service* rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital. [Italic supplied.]

Pausing here we note in the italicized phrases two concepts, economy of management and operation, and efficiency (and adequacy) of service. The word "or" in clause (5) is clearly used in the disjunctive. This separate meaning is emphasized when we come to section 11(b)(1) clauses (A) and (C), *infra.* It will be sufficient to note here, for both present and future purposes, that the Commission has taken the word "efficient" from this use in connection with service and joined it with the phrase "economy of management and operation," and has then built out of the combination the concept that until a loss of economy and efficiency is shown to be total there has been no loss of substantial economies under clause (A) within Congressional concern. We may note, also, an omission which we take seriously, that on the sole occasion that the Commission quoted clause (4) it substituted asterisks for the phrase we have italicized, and, although the legislative meaning of economies is the specific matter under consideration, has never referred to it. Clause (5), likewise, is never mentioned.

The definitions of "integrated public-utility systems" are found in section 2(a)(29). Subsection (A) defines an integrated electric system as one which, *inter alia,* "may be economically operated as a single

interconnected and coordinated system." Subsection (B) defines a gas system as where, *inter alia,* "substantial economies may be effectuated by being operated as a single coordinated system." During argument we inquired the reason for this difference. No suggestion was forthcoming. The only reason apparent to us is that in order for electric companies to constitute an integrated public utility system they must meet a technical requirement not applicable to gas companies seeking to qualify as an integrated system. Unlike gas companies, *General Pub. Util. Corp.*, 1951, 32 S.E.C. 807, 834-35, electric companies must be "physically interconnected or capable of physical interconnection." Where this requirement is met, so that actual interchanges of power could be made to meet power requirements at different points in the system, it was enough for Congress that the system as a whole "may be economically operated as a single interconnected and coordinated system." Assuming the other qualifications were met electric companies would not have to prove that system ownership would be cheaper than independent ownership, probably because this could safely be assumed where there would be a sharing of power.

Coming to section 11(b), the primary provision, subsection (1) requires that holding companies be restricted to a single integrated public utility system except when subclauses (A), (B) and (C) are satisfied. For clarity we quote in full.

> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

> (B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and
>
> (C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

These exceptions to section 11(b)(1) were added as a result of a compromise with the House. The original Senate bill had flatly restricted holding companies to a single integrated system. S. 2796, 74th Cong., 1st Sess. (1935). The House sought to permit as many systems as were consistent with the public interest. See H.R. Rep. No. 1318, 74th Cong., 1st Sess. 17 (1935). The Commission's then chairman objected that this would be intolerably indefinite. 79 Cong. Rec. 10838 (July 9, 1935); see also H.R. Rep. No. 1318, *supra*, at 45. Clauses (A), (B) and (C) were proposed as a compromise to establish "definite and concrete circumstances" where retention of more than one system would be allowed. Statement of House Managers, *supra*, at 70.

It is basic to the Commission's position that the phrase "substantitl economies which can be secured by the retention of control" in clause (A) is fundamentally different from "substantial economies [that] may be effectuated by being operated as a single coordinated system" in section (29)(B).[8] Such a con-

[8] The Commission is committed to this, and expressly so recognizes in its brief, because it rejected certain important evidence offered by NEES solely on the ground that the eight gas companies were conceded to be "a single integrated system." Since the Commission could not, either in good con-

tention, of course, is opposed to the common principle that the same words in different portions of an act are presumed to have the same meaning. In this case they are exactly the same.[9] To overcome the presumption calls for an affirmative showing.[10]

Furthermore, we find the Commission's interpretation of clause (A) opposed to the initial statement of the purposes of the Act, *supra*, the tenor of which was that holding companies had been found uneconomical to investors and to the public. It is not inconsistent with this to say that systems which do not offend in this respect, or in the other respects defined in clauses (B) and (C), should be continued instead of broken up, and that occasioning a loss of impressive proven economies was not the Congressional purpose. This was a business reorganization act designed to produce

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science or in law, accept as a concession a matter so fundamental, not only to the present proceedings, but for the future, if it were contrary to the fact, it stands that the Commission feels that saving $329,400 annually by integrating the eight gas companies is effectuating substantial economies under section (29) (B), but that $1,098,600 annually is not substantial economies under clause (A).

[9] The Commission's brief goes to some length in emphasizing the word "loss" in section 11(b) (1) (A). Sections 2(a) (29) (B) and 11(b) (1) (A) are not incomparable because the former speaks in terms of effectuating and the latter in terms of losing. The important comparison is the word "effectuated" in the one section and "secured" in the other. Both relate directly to "substantial economies."

[10] In a special effort to make this showing counsel argues that there is a policy in the Act against an electric utility system being combined with a gas system. The short answer to this is that neither the Act, nor the Commission itself, says so. Since, however, counsel's argument is extensive we will reply in kind, but in order not to prolong this footnote we will do so in an appendix, *infra*.

a healthier economic structure in a vital industry. It established what, in the opinion of Congress, accomplished the best overall conditions. At the same time, Congress remained receptive to what, in a particular instance and within the limits established by clauses (B) and (C), might be affirmatively shown to be a more economical arrangement. We hold that clause (A) called for a business judgment of what would be a significant loss, not for a finding of total loss of economy or efficiency. *Louisiana Pub. Serv. Comm'n* v. *S.E.C.*, 5 Cir., 1956, 235 F.2d 167, *rev'd on jurisdictional grounds*, 353 U.S. 368.

We are confirmed in this view by the fact that not only do clauses (B) and (C) contain additional conditions of retention, so that clause (A) need not be interpreted so as to cover the entire Congressional intent, but that these other clauses relate back fully to counterparts of the declarations of purpose made in section 1(b), and the attempts to effectuate those purposes through the definitions made in section 2(a) (29), *supra*. Clause (A) would do the same were it not for the special restricted meaning that the Commission seeks to give it. The Commission, in other words, has attached to "substantial economies" in this one particular place a special meaning that nothing in the Act points to, and which, in fact, destroys its symmetry.[11]

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[11] Drawing an equivalence between the proviso contained in clause (A) to section 11 and the corresponding requirements for an integrated gas system under section 2(a) (29) (B) nullifies no technical requirements in the definition of an integrated gas system because there are none. The definition of an integrated electric system under section 2(a) (29) (A) does contain some technical requirements, as has been pointed out, but these, also are not nullified by our interpretation of clause (A) since it remains stricter than section 2(a) (29) (A)'s re-

It might not be inappropriate to conclude with the quotation with which the Commission began a section of its brief. "As was stated [the brief says] in the report of the National Power Policy Committee: '[I]ntensification of economic power beyond the point of proved economies not only is susceptible of grave abuse but is a form of private socialism inimical to the functioning of democratic institutions and the welfare of a free people.' * * * H. Doc. No. 137, 74th Cong., 1st Sess. 4 (1935), appended to S. Rep. No. 621, 74th Cong. 1st Sess." We cannot think that "proved economies," any more than "substantial economies," mean anything other than economies which in ordinary business parlance and by ordinary business standards are of a substantial nature, considering, of course, the size of the companies to which the economies relate.[12] Clearly that was what was meant elsewhere in the Act. If in clause (A) Congress meant, instead, "cannot be operated efficiently as an independent system" it could readily have done so not only more clearly, but in fewer words.

The Commission's only answer is "the policy of the Act." We think the policy of the Act is to be found in the whole Act, not in one part. NEES has the burden of proving that it falls within an exception. This is enough, without a forced reading into that exception of some special meaning.

We regret the length of this discussion. Since, however, we find the Act not only consistent, but entirely responsive to analysis, we feel such analysis

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quirement that the electric system "may be economically operated."

[12] In this case the claimed losses are over 23% of gross income. See fn. 7, *supra*.

called for in fairness to those persons, whether investors or consumers,[13] who must absorb perhaps a million dollars a year (quite apart from over $800,000 allegedly lost to the electric system) which the Commission feels insubstantial.

The Commission having applied the wrong standard, its decision must be reversed unless on the record there could have been no finding in NEES' favor on the appropriate standard. We think clearly there could have been. NEES' case was based essentially upon a study made for it by Ebasco Services, Inc., (Ebasco), a management consultant which the Commission found possessed extensive experience in the utilities field. No rebuttal evidence, other than some exhibits, was offered on behalf of the Commission, which grounded its rejection of the report, to the extent that it did reject it, solely on criticism of the report's conclusions in the light of NEES' evidence or its own expertise. Its specific criticisms related to that portion of the report which dealt with certain costs totalling $472,100 or, more specifically, for the most part, customer and accounting costs included therein, for which the Ebasco estimate was $415,600. The first criticism concerned billing. The circumstances were these. Ebasco's original study was made on the assumption that the gas companies would be individually managed. On this hypothesis it naturally assumed that each company would conduct separate customer billing. When the Commission took the position that the gas companies constituted a single

[13] The Commission's finding it significant that it was insufficiently shown that this loss would require an increase in rates "at this time," fn. 7, *supra,* not only disregards the fact that the cost of doing a utility business normally is passed on to consumers eventually, but the fact that one of the purposes of the Act was to benefit legitimate investors.

integrated system and should be sold as such, Ebasco was required to reduce its estimate by the amount attributable to operating the gas companies individually rather than as a unit. It made no reduction with respect to customer billing.

On this subject NEES called three witnesses. One Quig, a representative of Ebasco with ample qualifications, testified to certain accounting savings that could be effected if the gas companies were operated collectively rather than individually. He stated, however, that Ebasco would not recommend, at least at the outset, centralization of certain matters, including billing; that a continuing study might show that further centralization would prove useful, but that it was by no means clear that economy lay in that direction, and that it would depend on such factors as business growth, new developments in mechanization, etc. Subsequently one Dalbeck, the principal officer of NEES' gas division, testified that it was conceivable that centralized billing might be effected to some degree, but that in his opinion it was not really important costwise; that he had made many studies of customer accounting procedures and had never found any real economies in centralization of billing. Thereafter one Johnson, an Ebasco representative with particular experience in customer accounting, testified that a detailed study would have to be made, which Ebasco had not done; that based upon his experience he had considered centralized billing for the combined operation and had made the judgment that there would be no economy, or at least "any substantial savings." The witness was cross-examined at length and showed a wide knowledge not only of specialized mechanical equipment in this area and the problems involved, but also of the particular practices of a large number of

named utilities in various parts of the country. He recognized that in many instances centralized billing prevailed, but continued to express doubts as to how much was saved thereby.

The Commission's response to this was to point out that some of the NEES gas companies presently combined their billing with the electric companies in their areas. This matter had been explained by NEES' witnesses, who pointed out, *inter alia*, the duplication of customers, which would not exist in the case of gas companies operating alone. The Commission concluded, however, that NEES had not "given any satisfactory reason why at least some form or forms of combined billing procedure could not be employed advantageously by the gas companies, in light of the fact that their aggregate of 237,000 customers is located in a relatively compact area."

We have serious doubts as to the extent that the Commission is entitled to disregard an opinion on a matter obviously requiring expert, specialized knowledge with no further evidence before it than what had been considered by the accepted expert. *Cf. United Shoe Mach. Corp.* v. *Industrial Shoe Mach. Corp.*, 1 Cir., 1964, 335 F. 2d 577, 579, *cert. den.* 379 U.S. 990; *Security-First National Bank* v. *Lutz*, 9 Cir., 1963, 322 F. 2d 348, 355; *Alvary* v. *United States*, 2 Cir., 1962, 302 F. 2d 790, 794; *Cullers* v. *Commissioner*, 8 Cir., 1956, 237 F. 2d 611, 616. This is not a matter on which a body having such broad jurisdiction as the Commission can have detailed expertise upon which to base affirmative findings. Compare *Market St. Ry.* v. *Railroad Commission*, 1945, 324 U.S. 548, 560. Without finally passing upon this point, since the case must go back in any event, we suggest that on this record the maximum the Com-

mission was warranted in inferring was that the difference in costs between separate and combined billing would not, if significant at all, constitute a sizable portion of the total added billing expense.

This brings us to what was the added billing expense, and hence the amount of error attributed to the Ebasco report because of its failure to assert the saving which, in the Commission's opinion, could be effected by having centralized billing. The Commission concluded merely that Ebasco's failure caused the estimate to be "overstated." It did not concern itself with discovering even what were the total increased billing costs, let alone the portion (obviously not the whole) which might be saved if centralized billing were adopted. It did find that the increased billing costs estimated for two of the eight gas companies, billing singly after divestiture, was $34,700 for the two. These companies covered more than half of NEES' gas customers. On a pro rata basis this would make the total billing increase for all companies $60,000. While doubtless such a projection is not precise, it seems significant that the Commission was not sufficiently interested to make any at all. Under the circumstances we do not think it unreasonable for us to point out that while the Commission was purportedly criticizing a cost estimate of over $400,000, strictly it was speaking of perhaps $60,000, only a portion of which could have been overstated.

We might have more sympathy with some, but not all, of the Commission's criticism of certain other alleged accounting disparities. Frankly, we are not sufficiently versed, nor do we find the record sufficiently helpful, to permit our analyzing them in every detail. However, it has not been contended that, even cumulatively, they remove from the Ebasco $472,000 cost estimate many sizable items.

After discussing the above matters the Commission said,

> In view of respondent's burden of proof and the absence of a persuasive explanation on the record, Ebasco's failure to consider employment of combined billing procedures and its inadequately explained disparate treatment of certain effects of severance on the gas and electric companies, respective, substantially impair the credibility and preclude the acceptance of its estimate of \$472,100 increase in treasury and accounting costs and, in turn, of its over-all estimate of increased costs (of which that figure is a material part) in the determination of whether severance would result in a substantial loss of economies.

If this constitutes a finding that the deficiencies which the Commission believes it has found are so serious that the Commission was entitled to reject the balance of the report from that very fact, we cannot agree. The doctrine of "*falsus in uno, falsus in omnibus,*" so far as it has any value, ordinarily applies to cases of deliberate falsehood. See 3 Wigmore, Evidence § 1013 (3d ed. 1940). The Commission has not suggested, and we see no possible basis for suggesting, that the discrepancies it complains of indicate bias or dishonesty. Absent a finding that the errors found are related to, or infect, other matters not directly discredited, if the "*falsus in uno*" doctrine, or a corollary, is to be used on any further basis to impeach an expert's report, it must be shown that the errors are so serious that they indicate substantial carelessness, or otherwise impugn the expert's qualifications. See *e.g.*, *Hoag* v. *Wright*, 1903, 174 N.Y. 36, 43; 66 N.E. 579, 581. Again, the Commission made no such findings. If there was a ground for them it has not been

suggested. Indeed, the Commission demonstrated its confidence in Ebasco elsewhere by accepting its cost estimates as the basis for concluding that the gas companies constitute an integrated system.

On the record there is a large, residual showing in the Ebasco report. Even at minimum it is $1,098,000 minus some fraction of $472,000. However, we do not think it presently appropriate for us to consider whether such minimum showing meets our interpretation of "substantial economies." We do state, however, that on remand the Commission must address itself to this problem by making specific findings, and not content itself with general conclusions. One illustration of this will suffice. The Commission states in its brief that it "had the right to consider competitive advantages of separation in offsetting alleged losses of economies." We do not question this. What we do question is the Commission's failure to find or articulate any specific or approximate financial benefit that such a change would occasion. Free competition, as the Act recognizes is normally beneficial. It is not necessarily so, nor in any assumed amount. The various automotive divisions of General Motors seem to do very well. More close to home, the Massachusetts Department of Public Utilities, which voices no apparent criticism of a number of combined local gas and electric companies within the Commonwealth, affirmatively appeared in opposition to the Commission's proceeding in the present case. The Commission states that the Department's views have been "carefully considered," but it goes no further. If the Commission is of opinion that substantial gains will accrue to the gas system by placing it in competition with the electric companies rather than, in part, under the same roof, specific findings should be made,

and not just a general reference to the advantages of competition. This is particularly called for where the evidence shows that NEES has made a special effort to obtain for its gas system many of the benefits of independence.

*Decree will be entered vacating the order of the Commission and remanding for further action not inconsistent herewith.*

## APPENDIX

In the Commission's brief counsel argues that section 11(b) embodies a federal concern with use of the holding company form to combine a gas system with an electric system.. There are several answers to this. In the first place, it is too specialized an approach. The meaning of this section and of sub-clauses (A), (B) and (C) must be the same whether the principal system and the additional systems are of like nature or are different. "Substantial economies," in other words, should have the same connotation in the one case as in the other.

Secondly, nowhere in the Act is there a condemnation of the retention of gas and electric systems, provided the tests contained in clauses (A), (B) and (C) are met. To the contrary, section 8 prohibits a holding company's acquisition of gas and electric utilities serving the same territory, where state law prohibits combined gas and electric operations, without express approval of the state commission. If anything, this is a negative pregnant, as the Commission has recognized and the legislative history makes clear. See *Northern States Power Co.*, 1954, 36 S.E.C. 1, 8; S. Rep. No. 621, 74th Cong., 1st Sess., 29-30; H.R. Rep. No. 1318, *supra*, at 14-15; Report of National Power Policy Committee, H.R. Doc. No. 137, 74th Cong., 1st Sess. 10 (1935), appended to S. Rep. No. 621, *supra*, at 59; Hearings Before House Committee on Interstate and Foreign Commerce on H.R. 5423. 74th Cong., 1st Sess. 330 (1935) (statement of Rep. Rayburn). How far such an inference may be carried in the light of the fact that section 10(c), which prescribes the standards for acquisitions, expressly incorporates the retention standards, and requires further that an acquisition tend toward the development of

an integrated system, may be questioned. *Cf. American Water Works & Elec. Co.*, 1937, 2 S.E.C. 972, 983 & n. 3; *Columbia Gas & Elec. Corp.*, 1941, 8 S.E.C. 443, 462-63; *American Gas & Elec. Co.*, 1946, 22 S.E.C. 808, 815. But at the least we find neither there nor elsewhere in the Act a general policy of opposition to gas and electric company joinder.

Nor, if the matter could be thought to be illuminated by administrative practice, has the Commission previously made such an interpretation, nor does it now. In its opinion the Commission stated, "We do not take the view that the Act expresses a federal policy against combined gas and electric operations as such." Counsel's attempt to explain this away by saying the Commission's phrase "as such" meant simply that the Commission was disclaiming interest when the interstate holding company form was not employed, attributes to the Commission the banality that it was not claiming jurisdiction in those cases where obviously it does not have it. We believe the Commission was saying something more than this, and that counsel, in the brief is merely seeking some new ground to support the Commission's result.

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